No. 311 Sup. Ct. U.S.

Brief of Hill & Hinsdale for Appellant.

Filed Oct. 16, 1896.

SUPREME COURT OF THE UNITED STATES.

No. 311.

THE PATAPSCO GUANO COMPANY, APPELLANT,

versus

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, W. R. WILLIAMS, *et al.*, APPELLEES.

BRIEF

OF

THOS. N. HILL AND JNO. W. HINSDALE,

COUNSEL FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 620.

THE PATAPSCO GUANO COMPANY, APPELLANT,

versus

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, W. R. WILLIAMS, *et al.*, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

Brief of Counsel for Appellant.

STATEMENT OF CASE.

A motion was made by the appellant for an injunction until the final hearing on bill, answer, affidavits and exhibits restraining the defendant from proceeding to enforce the fertilizer tax law of North Carolina against the appellant, its servants, agents or customers. The bill was filed April 4th, 1892. The material portions of said law are set forth in the seventh, eighth, ninth and tenth sections of the bill (pages four, five and six of the printed record).

The bill sets forth substantially (Record, pages 3 to 11) that the complainant was a corporation, duly created, organized and existing under and by virtue of the laws of the state of Maryland, and had been for a number of years engaged, in Baltimore, in the manufacture and sale of manipulated guano or commercial fertilizers of different brands, and that it had over three hundred thousand dollars invested in buildings, machinery and materials used in said manufacture, and that many millions of dollars were invested and used, and thousands of agents and laborers were employed and paid, in the general business of the manufacture of fertilizers for sale in this state and of the sale of the same; and that it had been selling said fertilizers in said state for a number of years, and that it had at great labor and expense built up a profitable business therein; that in con-

ducting its said business in said state, it was obliged to employ a large number of persons in different parts thereof as agents, and without such agents it could not properly or profitably conduct its said business; that its annual business in said state amounted to upwards of one hundred thousand dollars, upon which the profits largely exceeded ten thousand dollars a year; that the season (referring to the time of filing the bill April 4th, 1892) for the sale of fertilizers for use on summer and fall crops had arrived, and the complainant had manufactured a great quantity of goods, for which the demand was large, and was ready to put them on the market, and was continuing and desired to continue to manufacture a large quantity of said goods to meet the further demands of the season as it progressed; that it had already shipped a quantity of said fertilizer into said state for sale, and was shipping more and desired to continue to ship to said state a large quantity to meet the requirements of trade and the public demand; and that the defendants, Board of Agriculture and Commissioner of Agriculture of said state, give out and threaten that they will make seizures of all fertilizers which your orator has shipped or shall ship into this state, unless the same shall be tagged in accordance with the Act of General Assembly of North Carolina entitled "An Act to amend chapter one, volume two, of the Code, relating to agriculture and geology," and ratified on January 21, 1891, (Laws of North Carolina, 1891, p. 40), and that they will institute criminal prosecutions for an alleged misdemeanor against each of your orator's agents, who may sell or offer for sale, and against all other persons to whom your orator may sell for re-sale, upon each and every sale or offer for sale made or to be made or attempted to be made by such agents or other persons."

The bill then sets forth the Acts referred to as follows:

That the said defendants claim that your orator's goods are liable to seizure, and its agents and other purchasers for resale of its fertilizers are liable to criminal prosecutions under sections 2190, 2191, 2192 and 2193 of The Code of North Carolina, amended by the above-entitled act, which read as follows:

Sec. 2190. "For the purpose of defraying the expenses connect-with the inspection of fertilizers and fertilizing materials in this state there shall be a charge of twenty-five cents per ton on such fertilizers and fertilizing materials for each fiscal year ending November 13th, which shall be paid before delivery to agents, dealers or consumers in this state: *Provided*, the Board shall [have] the discretion to exempt certain natural material as may be deemed expedient. Each bag, barrel or other package of such fertilizers or fertilizing materials shall have attached thereto a tag stating that all charges specified in this section have been paid, and the state board of agriculture is hereby empowered to prescribe a form for such tags, and to adopt such regulations as will enable them to enforce this law. Any per-

son, corporation or company who shall violate this chapter, or who shall sell or offer for sale any such fertilizers or fertilizing material, contrary to the provisions above set forth, shall be guilty of a misdemeanor, and all fertilizers or fertilizing materials so sold or so offered for sale shall be subject to seizure and condemnation in the same manner as is provided in this chapter for the seizure and condemnation of spurious fertilizers, subject, however, to the discretion of the board of agriculture to release the fertilizers so seized and condemned upon the payment of the charge above specified and all costs and expenses incurred by the department in such proceeding: *Provided*, that tags shall be attached by manufacturers, agents or dealers to all fertilizers now in the state; those protected under licenses previously issued shall be furnished free of charge."

Sec. 2191. "Every bag, barrel, or other package of such fertilizer or fertilizing materials, as above designated, offered for sale in this state shall have thereon plainly printed a label or stamp, a copy of which shall be filed with the commissioner of agriculture, together with a true and faithful sample of the fertilizer or fertilizing material which it is proposed to sell, at or before delivery to agents, dealers or consumers in this state, and which shall be uniformly used, and shall not be changed during the fiscal year for which tags are issued, and the said label or stamp shall truly set forth the name, location and trade-mark of the manufacturer; also the chemical composition of the contents of such package, and the real percentage of any of the following ingredients asserted to be present, to-wit: soluble and precipitated phosphoric acid, which shall not be less than eight per cent.; soluble potassa, which shall not be less than one per cent.; ammonia, which shall not be less than two per cent., or its equivalent in nitrogen; together with the date of its analyzation, and that the requirements of the law have been complied with; and any such fertilizer as shall be ascertained by analysis not to contain the ingredients and percentage set forth as above provided shall be liable to seizure and condemnation as hereinafter prescribed, and when condemned shall be sold by the board of agriculture for the exclusive use and benefit of the department of agriculture."

Sec. 2192. "The proceedings to condemn the same shall be by civil action in the superior court of the county where the fertilizer is on sale, and in the name of the board of agriculture, who shall not be required to give bond for the prosecution of said action. And at or before the summons is issued, the said board shall, by its agent, make affidavit before the clerk of the said court, of these facts: (1) That charges have been paid as hereinbefore provided and the lawful tags attached. (2) That the sample of the same filed with the commissioner of agriculture has been analyzed under authority of the board and found to correspond with the label attached to the same. (3)

and that said tags were unnecessary, as they communicated no information to the purchaser which he did not have before, and which was not to be obtained from the printed label or stamp which accompanies each package. That if defendants were permitted to seize in every case of shipment or sale, or attempted sale, of the plaintiff's fertilizers, the statute allowing them to do so without giving bond to protect the plaintiff, and if they were permitted to institute criminal prosecutions at their pleasure for selling, or attempting to sell, fertilizers upon which the tax has not been paid, the complainant, its agents and customers would be subjected to a multiplicity of interminable and oppressive suits, equally vexatious and fruitless, and to an avalanche of reckless prosecutions, and that its business in the state would be utterly destroyed and it would suffer irreparable loss and damage.

That the attempt to enforce the law, the threats to do so having been widely circulated, and which must become more and more generally known, and the efforts made by the Commissioner, who was unable to respond in damages, would create a prejudice against fertilizers on which the tax had not been paid and cause many to decline to purchase complainant's goods; that some would entertain fears that purchasers would be subjected to penalties or be involved in trouble in court, or otherwise, and few would investigate the question, or be willing to act upon their own judgment, and unless the illegal tax was paid the goods would have stamped upon them the stigma of illegality and litigiousness, and the trade and business of plaintiff would be irreparably damaged; that within the last few days one of plaintiff's agents in Raleigh has declined to continue to act as such and sell its goods unless tagged, through fear of involving himself in difficulty and criminal prosecution; and likewise, in the last few days, it had shipped to a party in Raleigh a ton of its guano, but the railroad company refused to deliver the same to the consignee because it was not tagged; that said company had been forbidden by the department to deliver any fertilizer not tagged, and if the railroads were thus to be interfered with and prevented from transporting and delivery of its fertilizer in North Carolina, its business in said State would be destroyed and it would suffer irreparable loss and damage; that some of its competitors had purchased the tags, others would do so, and some for the purpose of advancing their own sales, or for error as to the validity of said law, would do what they could to decry its goods as unlawful subjects of sale or purchase, and thus alarm and deter persons from purchasing, for which the complainant would suffer irreparable loss and damage.

That complainant enjoyed a large trade in said state, and that even though the said tax might be declared illegal and its enforcement abandoned, yet the trade which it would have lost

in the meantime for any of said causes it would be impossible to recover, and thus it would be irreparably damaged; that the damage threatened exceeded two thousand dollars.

That it had at all times and expected to continue to comply with the said law except as to the payment of said tax, and had before shipping any fertilizer filed with the Commissioner a true and faithful sample of its fertilizer, with a label setting forth the name, location and trade-mark of the manufacturer, and the chemical composition of said fertilizer, according to the law, and that every bag or package that had been shipped into the state had a stamp or label setting forth the same, and it proposed that such as thereafter should be shipped into the state should have such stamp or label; that it had purchased from the Commissioner certain tags which he required to be attached to each package of two hundred pounds of fertilizers, but it did not propose to attach the same to said packages until and unless the court should give judgment to the contrary; and the foregoing facts and conditions show the immediate great and irreparable loss and damage to which it would be subjected by the enforcement of said law and the public promulgation of the threat to execute the same by seizures and criminal prosecutions.

The answer of the defendants (Record, pages 15 to 18) admits such averments of the bill as are not hereinafter referred to.

It states that the defendants had no knowledge or information sufficient to form a belief as to the capital invested by the complainant in the business, and denied that many millions of capital were invested and thousands of agents and laborers were employed in the manufacture of fertilizers for sale in North Carolina; that defendants had no knowledge or information sufficient to form a belief as to the extent to which complainant had been engaged and its profits, and alleged that unless the complainant had been selling without complying with the law, its purchase of tags, which show the tonnage tax, demonstrate that the statement of its annual business was grossly exaggerated.

Defendants admit that the taxes collected in 1891 were $32,894, but denied that the amount was a fixed sum, and averred that said amount was unusually large and could not be collected again; that the receipts had greatly fallen off in 1892, and defendants could not reasonably expect to collect more than $24,000 in all, and that sum would not be more than necessary to carry on the operations of the Department in its inspection of fertilizers, in the proper analyzation of the same and in publishing the results of such analyses, and in protecting the farmers and citizens of the state against imposition and loss on account of spurious fertilizers. They deny that, under the law, taxes amounting to between $30,000 and $40,000 were annually exacted from the manufacturers of fer-

tilizers doing business in North Carolina, except as in said answer was thereafter admitted.

They deny that the Board of Agriculture pretended anything, and averred that the tax varied in amount from year to year, and it was impossible to foresee the amount of revenue to accrue from it. That in order to raise sufficient revenue to have the fertilizer analyzed, and the people protected against fraud and against spurious and worthless fertilizer being palmed off on them, it was necessary to maintain a department or bureau, to have sufficient executive and clerical force, a staff of chemists to perform the analyses, to keep inspectors in the field at considerable expense, to draw samples of the three hundred and fifty brands used in the state. They deny that not more than one-fifth of the tax was necessary for such purposes, and aver that all of it was necessary. They deny that any unnecessary employees were maintained, and that any part of the fund was applied to the support of the Agricultural and Mechanical College and to the other purposes alleged in the bill, averring that the provisions for such appropriations have been repealed; that in order properly to inspect, analyze and control fertilizers, it was essential that the work be done promptly and accurately, and that a sufficient force be kept throughout the Department to manage executive details, receive money, and fill orders for a million or more tags each year, and a force of inspectors traveling over the state for the purpose of receiving samples of such fertilizers as should be brought to or made in the state, and to prevent the introduction and sale of spurious goods; that a force of chemists be maintained in order to analyze samples, and that the analyses be published and distributed for the information of purchasers; that the number of brands was constantly increasing, now amounting to three hundred and fifty; and the entire amount received from the tax, as well as could be calculated, would be required for the legitimate purposes of the Department. And the defendant, when required, would make a full exhibit of its receipts and expenditures.

The defendants further allege: That the $7,000 paid the Experiment Station June 19, 1891, was paid exclusively for analyses of fertilizers, the payment being made to the Experiment Station because the Experiment Station and Agricultural Department used the same laboratory and, to some extent, the same chemicals, and in this way the work was done economically. The $2,065.57 paid the A. and M. College January 27, 1892, was in repayment of a loan theretofore to the Department by the college. The amount paid for printing bulletins was an important and necessary part of the work. The amount ($9,000) paid to the World's Fair was a loan. The receipts during 1891 were larger than usual, and the Department made a loan to the World's Fair which, in case of deficiency in its rev-

enue, it would seek to have repaid. No such surplus was expected again.

The defendants further aver, that the law is constitutional; that it was imposed for the purpose of paying the expense of inspection, and was not an impost or duty, and deny that said tax was illegal and oppressive, and that the tags did give information which could not be obtained from the labels, and charges the complainant with gratuitous conduct for giving his views of, or criticising the law, and deny the damage claimed. That the railroad company had been required by the department to obey the law, but it had no knowledge or information sufficient to form a belief as to the averments that one of complainant's agents has discontinued to act as such for fear of involving himself in difficulty and criminal prosecution, and that the railroad company had refused to deliver a ton of guano to the consignee, because it was not tagged.

They admit that complainant is ready to comply with any law which does not provide for inspection or analysis or the payment of any tax to have its fertilizers analyzed.

They further claim that the defendants, R. W. Wharton and others (except the Commissioners of Agriculture), are not proper parties, and set up the defence that the Board of Agriculture is one of the departments of the state government, and the circuit Court had no jurisdiction to maintain an action against it.

Replication was filed June 11, 1892. (Record, page 19.)

At November Term, 1892, the complainant's motion was refused and the injunction dissolved. (Record, page 29.)

The evidence offered by complainant appears on printed record, pages 50 to 119 inclusive.

At June Term, 1893, this cause was heard on the pleadings, depositions and exhibits, and the bill was dismissed with costs and judgment was rendered in favor of the defendant and against the plaintiff and sureties for said costs. (Printed Record, page 120).

On the 7th day of December, 1893, complainant filed assignment of errors, and applied for and was granted an appeal to the Supreme Court of the United States. (Printed Record, pages 121 and 123.)

SPECIFICATION OF ERRORS.

I. "That the court below held that the act of the General Assembly of North Carolina entitled 'An act to amend chapter one, volume two, of The Code, relating to agriculture and geology,' ratified on the 21st day of January, 1891, imposing a tonnage tax of twenty-five cents on each and every ton of fertilizer or fertilizing material made or brought into the state, to be paid before delivery to agents, dealers and consumers in the

state, or before a sale or offer to sell the same, and subjecting any person violating the provisions of said act to criminal prosecutions and penalties, is not unconstitutional, null, and void, in that it is repugnant to so much of section eight of article one of the constitution of the United States as provides that "the congress shall have power * * * to regulate commerce with foreign nations, and among the several states and with the indian tribes."

II. "That it held that charge or tax is not repugnant to so much of sub-section two of section ten of article one of said constitution as provides that 'no state shall, without the consent of congress, lay any imposts or duties on imports and exports, except what may be absolutely neccssary to execute its inspection laws,' and therefore is null and void."

III. "That it held that said charge or tax is an inspection law within the contemplation of said clause of said constitution, and therefore constitutional and valid."

IV. "That it held that the said charge or tax is applicable by law exclusively to purposes of inspection of fertilizers and fertilizing materials, whereas it should have held that the same, upon the face of the various statutes relating to the subject, is applicable to purposes foreign to inspection, to-wit, to pay the salary of the analyst (Code, section 2196); the expenses of the Geological Museum and publication of the 'Geology of North Carolina' (Code, section 2198); the expenses of preparing hand books, with illustrated maps, in regard to mines, minerals, forests, climates, and water powers, fisheries, mountains, swamps, industries, and other statistics, to give information to immigrants, and to make expositions thereof and to offer premiums (Code, section 2199); the expenses of immigration agents (section 2200); the expenses of establishing and keeping a general land and mining registry (section 2201); expenses of the North Carolina Industrial Association, five hundred dollars per year (2206); expenses of the North Carolina Industrial School (Agricultural and Mechanical College), five thousand dollars per year (Acts 1885, ch. 308, section 4; Acts 1887, ch. 2110, sec. 1); the expenses of publication of geological reports. (Acts 1887, ch. 409, sec. 15.)"

V. "It is held that the said tax is absolutely necessary to execute the inspection of fertilizers, whereas it should have held that the tax is much in excess of what is absolutely necessary therefor."

VI. "That the court refused to consider the evidence introduced to show that the amount of money raised by said tax was much in excess of what was absolutely necessary for that purpose."

VII. "That the evidence showed that the tonnage tax collected from January 21st, 1891, to January 1st, 1892, was $33,-264.08, and the absolute necessary expenses of executing the

inspection did not exceed $10,000, and the court held that this excess was not material to show that the charge was not an inspection law under the constitution."

VIII. "That the evidence showed that the tonnage tax collected from January 1st, 1892, to January 1st, 1893, amounted to $27,690.16, and the necessary cost of inspection did not exceed $10,000, and the court held that this excess was not material to show that it was not an inspection law."

IX. "That the evidence showed that the tonnage tax collected for the months of January, February, March, April, and a part of May. 1893, was $22,567.25, and the cost of inspection did not exceed $5,000, and the court held that this excess was not material to show that it was not an inspection law."

X. "That the court did not hold that the tax was colorably an inspection charge only."

XI. "That the court did not hold that the said charge was excessive, and as such shows a purpose to evade the intentions of the constitution."

XII. "That the court held that said charge is a police regulation and the legislature of North Carolina had the power to exact it."

XIII. "That the court held that, notwithstanding the evidence and the admissions in the answer of the defendants show that much the larger portion of said tax was not necessary for purposes of inspection and was appropriated and applied to purposes foreign thereto, that the said act is an inspection law, and said tax is absolutely necessary for executing said law."

XIV. "That the court dismissed the bill of the complainants."

ARGUMENT.

I.

THE CIRCUIT COURT HAS JURISDICTION AGAINST THE DEFENDANTS AS OFFICERS OF THE STATE.

The state is not a party on the record.

Osborn *v.* Bank of United States, 9th Wheat., 738.
United States *v.* Lee, 106 U. S, 196.
Poindexter *v.* Greenhow, 114 U. S., 270.
Allen *v.* B. & O. R. R., 114 U. S., 311.
Hagood *v.* Southern, 117 U. S., 69.

II.

THE FIRST SPECIFICATION OR ERROR IS:

"That the court below held that the act of the General Assembly of North Carolina entitled 'An act to amend chapter one, volume two, of the Code, relating to agriculture and geology,' ratified on the 21st day of January, 1891, imposing a tonnage tax of twenty-five cents on each and every ton of fertilizer or fertilizing material made or brought into the state, to be paid before delivery to agents, dealers and consumers in the state or

before a sale or offer to sell the same, and subjecting any person violating the provisions of said act to criminal prosecutions and penalties is not unconstitutional, null and void, in that it is repugnant to so much of section eight of article one of the constitution of the United States as provides that 'the congress shall have power, * * * to regulate commerce with foreign nations and among the several states and with the indian tribes."

In order to discuss satisfactorily the question presented by this exception, it becomes necessary to give a succinct history of the legislation which the bill of complainant assails:

On the first day of November, 1883, The Code of North Carolina went into operation and become "conclusive evidence of the law." (Section 3877).

Chapter one of volume the second is entitled "Agriculture and Geology," and embraces sections 2184 to 2226 (both inclusive) of the Code: It provides for the establishment and operation of "a department of agriculture, immigration and statistics" to be composed of the governor of the state and other persons therein specified. (Section 2184).

Section 2186 confers upon the Board the power to appoint a Commissioner of Agriculture.

The duties of the Board are specified in section 2189 (which is composed of nine sub-divisions). Among other matters they are "especially charged (sub-division 9)," with the enforcement and supervision of the laws and regulations, which are or may be enacted in this state for the sale of commercial fertilizers and seeds.

By section 2190, a license tax of five hundred dollars was required to be paid annually for each separate brand or quality before any fertilizer could be sold or offered for sale in the State of North Carolina, and non-compliance with this requirement subjected the delinquent to summary and penal provisions prescribed for its enforcement.

This tax was declared to be unconstitutional by the circuit court of the United States for the eastern district of North Carolina in the case of *The American Fertilizer Company* v. *The Board of Agriculture*, 43 Fed. Rep., 609.

In the year, 1891, the amendments were made, which are set out in the pleadings.

The imposition of the tax and the forfeitures and penalties prescribed for violation of the provisions of the law so far as they affect merchandise imported into the state are a burden upon the freedom of commerce, a regulation thereof, and null and void.

The act does not, on its face, discriminate against the products of other states.

The appellant is a Maryland corporation, doing business in

Baltimore. It is extensively engaged in the manufacture of fertilizers, and has a large amount of capital invested in the business, and has for a number of years been shipping its fertilizers to North Carolina for sale. It does a large business in that state.

Before this suit was commenced the defendant Board of Agriculture threatened to seize the appellant's fertilizers shipped into the state unless they were tagged, as prescribed in the act imposing the tax and "institute criminal prosecutions against each of its agents who would sell or offer for sale, and to all other persons to whom it should sell for resale, upon each and every sale or offer for sale made, or to be made, or attempted to be made by such agents or other persons."

In the case of *Robbins* v. *The Taxing District of Shelley County*, 120 U. S., 489, an act of the legislature of the state of Tennessee was considered by the court, to-wit: "All drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein, by sample, shall be required to pay to the county trustee the sum of ten dollars ($10) per week, or twenty-five dollars per month, for such privilege; and no license should be issued for a longer period than three months."

Robbins was a citizen of Cincinnati, Ohio, and was soliciting trade in Tennessee, by the use of samples, for a Cincinnati firm, all of the members of which resided and did business in that city. Robbins was arrested for violating the provisions of the act. This court declared the act to be unconstitutional, because it attempted to regulate commerce between the states.

There were no words in the act discriminating against foreign drummers in terms. Yet, the court says: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers, those of Tennessee and those of other states. That all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."

See, also, case of the State Freight Tax, 15 Wallace, 232; Brown *v.* Maryland, 12 Wheat, 419.

In the case of *Gibbons* v. *Ogden*, 9 Wheat, 1, Chief Justice Marshall, delivering the opinion of the court, says, at page 4:

"The words are: Congress shall have power to regulate commerce with foreign nations, and among the several states and with the indian tribes."

"The subject to be regulated is commerce, and our constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. Commerce un-

doubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it. "These words" do not comprehend that commerce which is completely internal; it may very properly be restricted to that commerce which concerns more states than one. The enumeration presupposes something not enumerated, and that something, if we regard the language, is the subject of the sentence, must be exclusively internal commerce of a state.

The constitutionality of an act is not determined so much by its intent as by its effect. Whether or not the act is a regulation of commerce depends upon what the burden is put. The State Freight Tax case, *supra*, at p. 272.

It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the case of *Bank of Commerce* v. *New York City*, 2 Black, 620; in the *Bank Tax Case*, 2 Wall., 200; *Society for Saving* v. *Coite*, 6 Wall., 594; and *Provident Institution* v. *Massachusetts*, 6 Wall., 611.

In these cases the banks were required to pay the tax, but the decisions turned upon the question, "What was the subject of the tax, and upon what did the burden really rest; not upon the question from whom the state exacted payment into its treasury."

By the language of the act which we are considering, the tax is a charge on all fertilizers in this state, no matter whence they come. The words, "There shall be a charge of 25 cents per ton on such fertilizers," etc., which must be paid "before delivery to agents, dealers or consumers in this state," apply to all fertilizers, whether manufactured in the state or brought into it from other states.

In the State Freight Tax case, the question was in regard to a tax on each two thousand pounds of freight carried by railroad and other companies doing business in Pennsylvania. This act applied alike to all companies whose lines of transportion extended beyond the limits of the state as well as to those whose lines were wholly within its limits. The court held, that this tax was not imposed on the franchises, the business or the property of the companies, but upon the freight. The opinion further states: "The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious

the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines." (Page 276.)

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional it is not cured by including in its provisions subjects within the domain of the state." (Page 277.)

The power to tax is the power to destroy. The power to tax, and not the amount of the tax, is the question to be considered. The danger lies in the uncontrolled exercise of this power by the state.

McCulloch *v.* Maryland, 4 Wheat., 429.

The above principles apply in full force to the North Carolina acts. The tax of five hundred dollars imposed by the original act was clearly a tax on the privilege of selling fertilizers within the state. It was held unconstitutional because it imposed a burden on the property imported into the state.

The manufacturer or importer was required before selling or offering for sale any guano or other fertilzier to "obtain a license therefor from the treasurer of the state, for which should be paid a privilege tax of five hundred dollars per annum, for each separate brand or quality." This tax was a condition precedent to selling the article or offering it for sale and acted as a restraint upon freedom of traffic between the states. Upon failure to comply with the requirements of the law the manufacturer or importer becomes liable to indictment, and the fertilizer liable to be seized and condemned as spurious fertilizers." 2 N. C. Code, sec. 2190.

The circuit court of the United States held this tax to be unconstitutional, (*American Fertilizer Co.* v. *Board of Agriculture of N. C.*, 43 Fed. Rep., 609), and Judge Seymour, delivering the opinion of the court, says in regard to it:

"Although the statute in question does not in words impose a tax on fertilizers imported into the State, but one on the privileges of selling or offering them for sale only, it is not now admissible to argue that the latter is not equivalent to the former. That question was settled in *Brown* v. *Maryland*, 12 Wheat., 419.

In that case the court held the tax to be unconstitutional and among the reasons assigned for the decision were the following:

"All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true a state may tax occupations generally, but this tax must be paid

by those who employ the individual or is a tax on his business. The lawyer, the physician or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person.

This the state has the right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is in like manner a tax on importation.

It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution."

The Act of 1891 is as complete a restriction upon freedom of intercourse as could well be conceived. It is a barrier to interstate traffic. "Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part." *Ibid.*

The tonnage tax is a restriction upon sales, the main object of importation. It is not a tax on occupations generally, but if upon any occupation, it is one upon that of the importer which, we have seen, is prohibited by the constitution.

It is not a tax on property exclusively within the jurisdiction of the state, but applies to such as is within its jurisdiction as well as to such as is not. It is not a tax to be paid by the person selling, but upon the importer or consumer.

The Act provides (Record, page 4) that "there shall be a charge of 25 cents per ton on such (*i. e.* in this state) fertilizers and fertilizing material for each fiscal year, ending November 30th, which shall be paid before delivery to agents, dealers or consumers in this state."

If this is not a tax on sales, or the privilege of selling, and as such, a tax on the article itself, it is hard to conceive of one. It is true there is no provision in terms that a license shall be obtained before selling or offering for sale, but the barrier against a sale is just as distinct. The requirement to obtain a license and pay $500 for it as a condition precedent to selling under the original act, was no greater hindrance to freedom of traffic than the imposition of the tonnage tax and its attendant penal provisions. The requirement of a license under the original act was intended to give the person procuring it evidence to show that he had paid the tax, and thereby had acquired authority to sell. The license was a formal matter. The substantial thing was the payment of the tax. This being done the license followed as a matter of right, while under the Act of 1891 there is in terms no license required to be obtained; it is essential that the tax be paid before selling or offering for sale, and the tax in this case, too, is the substantial act to be performed. It too is a burden on the article taxed and its payment is a condition precedent to selling.

While there is no license to be formally obtained from the

Treasurer, there is a requirement equivalent to it. The same section which provides for the tonnage tax also has the following clause:

"Each bag, barrel or other package of such fertilizers or fertilizing materials shall have attached thereto a tag stating that all charges specified in this section have been paid, and the State Board of Agriculture is hereby empowered to prescribe a form for such tags, and to adopt such regulations as will enable them to enforce this law."

There are further provisions to the effect that a failure to comply with this duty will subject the offender to indictment and his fertilizer to seizure and condemnation as spurious fertilizers.

Now it is not stated by whom these tags are to be issued, but as it is the duty of the Board of Agriculture to "adopt such regulations as will enable them to enforce" the law, it follows that this is a part of their duty also. At any rate, they perform this duty.

Now, is not the requirement in regard to affixing the tags substantially a requirement for the purchase of a license? What is the tag but a license? It is not called one, it is true. But it constitutes the evidence that the tax has been paid, and that the person who has paid it has acquired the right to sell. It is the same in effect as the license under the original act.

The tax is the burden in this as in that case, and equally a hindrance or obstruction to interstate commerce. A sale without these requirements being complied with would be illegal and the seller a criminal.

Section 2, Chapter 9, Acts of 1891, provides that, "Every bag, barrel or package * * * offered for sale in this state shall have thereon plainly printed a label or stamp, a copy of which shall be filed with the Commissioner of Agriculture, together with a true and faithful sample of fertilizer or fertilizing material which it is proposed to sell, at or before the delivery to agents, dealers and consumers in this state," &c., &c.

This differs from Section 2191 of The Code, for which it is substituted, in this: The latter provides that the stamp or label shall be affixed and a copy filed with the Commissioner at or before the shipment of such fertilizer into this state; the former that it shall be affixed to such as may be offered for sale in the state, no matter whence it may come.

This is a distinction without a difference, as both operate alike on interstate commerce.

The sections above referred to do not contain all of the hindrances to and restrictions upon traffic between the states.

Section 4, Act of 1891, provides that "Any merchant, trader, manufacturer, or agent who shall sell or offer for sale any commercial fertilizer or fertilizing material without having such labels, stamps or tags * * * * attached thereto, or shall

use the required tag the second time to avoid the payment of the tonnage charge, or if any person shall remove any such fertilizer, he shall be liable to a fine of ten dollars for each separate bag, barrel, or package, sold or offered for sale or removed. * * * * * And any person who shall sell, offer for sale or remove any such fertilizers, or any agent of any railroad or other transportation company who shall deliver any such fertilizers, in violation of this section, shall be guilty of a misdemeanor."

Section 6 provides that: "It shall be lawful for the Department of Agriculture to require the officers, agents, or manufacturers of any railroad, steamboat or other transportation company transporting fertilizers or fertilizing materials in the state to furnish monthly statements of the quantity of such fertilizers, with the name of the consignor and consignee, and the name of the brand delivered on their respective lines at any and all points within this state; and said department is hereby empowered to compel said officers, agents and managers to submit their books for examination, if found expedient so to do; and any such agents, officers or managers failing or refusing to comply with the requirements of this section, shall be guilty of a misdemeanor."

The object of all the provisions of the statute to which we have referred is to enforce the collection of the tax, and as a means to that end, each one of the several sections contains some requirement to be complied with before the article is to be sold or offered for sale. These prohibitions extends to all who may be interested—the manufacturer, importer, retail dealer, agents and transportation companies—and the last named section of the act cited provides, in some instances, for an inquisitorial examination of the books of the transportation companies.

There is no tax against the persons referred to, nor is there any provision for collecting it out of these persons. The only provision in regard to collecting the tax is to be found in section 2192 of The Code, as amended by section 3 of the act of 1891, which is set out as amended on page 5 of the record.

The tax is upon the fertilizer or the sale thereof, and in order to enforce its collection, proceedings for seizure and condemnation of it are provided for: the requirement that tags shall be purchased and affixed to the packages, that labels shall be filed, and the penalties provided for violation of the act shall be imposed, all contribute to the collection of this tax, and necessarily affect the fertilizer itself. The penalties and criminal liabilities alone affect the persons concerned, and these are subsidiary or incidental to the main object of the statute. The tax affects them indirectly only.

The effect of these enactments is—

(1) As a condition precedent to the delivery of the fertilizer to agents, consumers or dealers, or selling or offering to sell it,

the tax must be paid, and the tags affixed, and the labels stamped or printed and filed.

(2) These prohibitions extend to merchants, traders, manufacturers or agents, who shall sell or offer for sale or remove, and to the agents of any railroad, or other transportation company, who shall deliver any fertilizer without the labels, stamps and tags.

(3) Any person violating the provisions of the act becomes liable to suit for penalties and to criminal prosecution, and the railroad companies are subjected to inquisitorial examination of their books, papers, etc.

So far as these requirements affect fertilizers imported into the state, they are regulations of commerce and unconstitutional, null and void.

It will be observed that the act forbids any merchant, trader, manufacturer or agent selling or offering to sell in the state. This applies to manufacturers of and dealers in such fertilizers as were brought into the state from another state as well as to those manufactured within the state. It thus imposes burdens upon the persons named, and becomes a restriction upon interstate commerce.

If a manufacturer of goods which are the subjects of interstate traffic cannot sell, remove or deliver his wares, they are of no value to him, and the burden is one which the state has no right to impose.

Brown *v.* Maryland, *supra.*

Under the principle established in *McCall* v. *California,* 136 U. S., 104, this tax is laid on the means or occupation of carrying on interstate commerce when applied to those dealers and manufacturers whose business it is to bring fertilizers from other states into North Carolina for sale.

In that case, McCall was soliciting agent for passengers over a railroad extending from New York to Chicago. He had failed to pay a license tax "for every railroad agency, twenty-five dollars per quarter."

The court held that McCall's business was interstate commerce, and that "it must follow that the license tax exacted of him as a condition precedent to his carrying on that business was a tax on interstate commerce, and therefore violative of the commercial clause of the constitution." The court cited the following from *Lyng* v. *Michigan,* 135 U. S., 166: "We have repeatedly held that no state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress;" and the following from

Mobile v. *Kimball*, 102 U. S., 691–702: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transit of persons and property, as well as the purchase, sale and exchange of commodities."

In other words, it includes transportation and things or persons transported.

In *Leloup* v. *Mobile*, 127 U. S., 640, the question was whether the legislature of Alabama had a right to impose a license tax on a telegraph company for transacting the business of transmitting messages between the different states. Mr. Justice Bradley, in delivering the opinion of the court, says:

"The question is squarely presented to us, therefore, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another. * * * Can a state prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax or procure a license for the privilege? If it can, it can exclude such company and prohibit the transaction of such business altogether. We are not prepared to say this can be done; ordinarily, occupations are taxed in various ways, and in most cases legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation of doing a business and is surely a tax on the business."

In the case of *Gloucester Ferry* v. *Pennsylvania*, 114 U. S., 196, the court held that under an act of the legislature of Pennsylvania, imposing a tax on every company or association doing business in that state, the state could not collect a tax out of the company whose whole income was derived from the transportation of freight and passengers from Gloucester, in New Jersey, to Philadelphia and back. The said company was chartered by the legislature of New Jersey. Its entire business and property was in that state, except a wharf in Philadelphia, which it leased for a term of years. The tax was laid on the capital stock of the company.

Mr. Justice Field, delivering the opinion, says: "Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon the transportation; that is, upon the commerce between the two states involved in such transportation."

* * * * * * *

"Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that

purpose, as well as the purchase, sale and exchange of commodities."

In the case of *Henderson* v. *Mayor*, 92 U. S., 260, the question involved was the right of the state of New York to require the master of every vessel coming from a foreign port, ~~either~~ within twenty-four hours after reaching New York, to report in writing to the mayor the names, birth place, last residence, and occupation of every passenger who is not a citizen of the United States, * * * and to require the owner or consignee of the vessel to give bond for every passenger so reported, in a penalty of $300; * * * to indemnify the commissioners of immigration, and every county, city and town in the state against any expense for the relief and support of the person named in the bond, for four years thereafter. The owner or consignee could be relieved of giving such bond "by paying for each passenger, within twenty-four hours after his or her landing, the sum of one dollar and fifty cents, fifty cents whereof is to be paid to the counties in the state, and the residue to the commissioner of immigration for general purposes, and particularly to be used in erecting wharves and buildings, and in paying salaries and clerk hire."

The court says: "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign port and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*.

To require a heavy and almost impossible condition to the exercise of that right, with the alternative of payment of a small sum of money is, in effect to demand payment of that sum.

At page 271, it says: "A law or rule emanating from a lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers is a regulation of commerce.

The application of this rule to our case is very plain, as no fertilizer can be put on the market either by sale, offer for sale, or delivery or removal by persons or corporations until all the requirements as to the tax, tags and labels are fully complied with. In this case the *Passenger Cases*, 7 How., 283, are cited with approval and the case of *New York* v. *Miln* is practically overruled.

The *State Freight Tax case*, 15 Wall., 232, involved the constitutionality of an act of the legislature of the state of Pennsylvania, which provided substantially that the president or

some other officer of all railroad, steamboat, and other companies doing business in the state and over whose works freight may be transported should "make return in writing to the auditor general under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through, or upon the work of said company," whose reports were to be made quarterly, and each of the companies upon such returns being made was to pay to the state treasurer, to the use of the commonwealth, on each two thousand pounds of freight so carried a certain tax.

The Reading Railroad Company was charged by the accounting officers with this tax. This company was chartered by an act of the legislature of Pennsylvania, its sole business was the transportation of passengers and freight, and carrying no commodities of its own. A portion of the coal carried by it is consumed in the state, but the larger portion is exported beyond the limits.

The court held that this action, in so far as the company was concerned, was a regulation of commerce.

Judge Strong, delivering the opinion of the court, says (page 272):

"Upon what is the tax imposed? * * * * Where does the substantial burden rest? Very plainly it was [not] intended to be, nor is it in fact, a tax upon the franchise of the carrying companies or upon their property or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid on the freight carried."

A page 275, he says: "Beyond all question the transportation of freight or of the subject of commerce, for the purpose of sale or exchange; is a constituent of commerce itself."

* * * * * * * * *

In his work on the constitution, Judge Story asserts that commerce as used in that instrument includes not only traffic, but intercourse and navigation. And in the *Passenger Cases* (7 How., 416), it was said, "Commerce consists in selling the superfluity; in purchasing articles of necessity; as well productions as manufactures; in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight.

* * * * * * * * * *

"Then why is not a tax upon freight, transported from state to state, a regulation of interstate transportation, and therefore a regulation of commerce among the states? It is not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the state, and in taking them out? The present case is the best possible illustration. The legislature has, in effect, declared that every ton of freight taken up in the state and carried out, or taken up in other states and brought within her limits, shall pay a specified

tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of thes tate, may impose one of five dollars. Such an imposition, whether large or small, is a restraint upon the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines. It would hardly be maintained, we think, that had the state established custom houses on her borders, wherever a railroad or canal comes to the state line, and demanded at these houses a duty for allowing merchandise to enter, or to leave, the state upon one of these railroads or canals, such an imposition would not have been a regulation of commerce with her sisters tates. Yet, it is difficult to see any substantial difference between the supposed case and the one we have in hand." * *

"Nor can it make any difference that the legislative purpose was to raise money for the support of the state government and not to regulate transportation. It is not the purpose of the law, but its effect which we are now considering."

It is certain that the tax in the case before the court was not on the business of the plaintiff, because its domicile was in Baltimore, and the *situs* of the fertilizer were there also.

The plaintiff, the Patapsco Guano Company, was a corporation created and organized under the laws of Maryland, and was engaged in the manufacture of fertilizers in the city of Baltimore, and had a large amount of capital invested in its business at that place. It had been selling fertilizers in North Carolina for many years, and had built up a profitable business therein. (Page 3 of Record, secs. 1, 2 and 3.) It had shipped a quantity of its fertilizer into North Carolina for sale, and was shipping more, and desired to continue to do so in order to meet the requirements of its trade and the increasing demand of the public for it. The defendant had threatened to "make seizures of all fertilizers which the plaintiff company had shipped, or should ship, into said state, unless the same should be tagged in accordance with the act of assembly, etc.," * * and that they would institute criminal prosecutions for an alleged misdemeanor against each of the plaintiff's agents, who might sell, or offer for sale, and against all other persons to whom the plaintiff might sell for resale, upon each and every sale or offer for sale made, or to be made or attempted to be made, by such agents or other persons. (Record, secs. 5 and 6, page 4.)

It further appears that one of the plaintiff's agents in Ral-

eigh, through fear of involving himself in difficulty and criminal prosecution, had declined to continue to act as such agent and to make sales of the plaintiff's goods, unless they should be tagged in pursuance of the act, and that within a few days before the suit was commenced, the plaintiff had caused to be shipped to a party in Raleigh a ton of its guano, but the railroad company, on receiving the same in Raleigh, had refused to deliver it to the consignee because it was not tagged, and the company had been forbidden by the defendant Board of Agriculture, to deliver any fertilizers which had not been tagged. (Record, pages 8 and 9, secs. 15*a* and 15*b*.)

The plaintiff has complied with all of the requirements of the law, except the payment of the tax. (Record, p. 9, sec. 19.)

It is extremely difficult, in fact impossible, to distinguish in principle the operation of this law from the imposition of a duty to be collected by a custom-house official stationed on the border of the state. It is very true the guano was the property of the plaintiff, but it was in transit from Baltimore to Raleigh and had never acquired a *situs* in North Carolina. It was, then, not the subject of taxation by the state laws as property of the plaintiff. The law imposes various conditions to be performed by the plaintiff before the fertilizer could be delivered, removed, sold or offered for sale. It was not in a condition to be sold, on account of the obstructive requirements. In fact, the imposition of a tariff duty has precisely the same effect; and the fact that in one case the tax is paid to a custom-house officer, and in the other into the state treasury, is not a sufficient dissimilarity to alter the application of the principle. Both act as conditions precedent and obstructions to a sale until the tariff in one case and the tax in the other is paid.

The *State Freight Tax Case* has also the following: "Nor can it make any difference that the legislative purpose was to raise money for the support of the state government and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering."

It may be well to observe at this place that the act of North Carolina professed to levy the tonnage tax for the purposes of inspection, but its effect was a regulation of commerce. The subject of inspection, however, is discussed more fully in subsequent pages of this Brief.

See, also Passenger Cases, 7 How., 458.
Ashley *v.* California, 24 How., 169.
Crandall *v.* Nevada, 6 Wall., 35.
Woodruff *v.* Parham, 8 Wall., 138.

The principles decided in the case of *Pickard* v. *Pullman Car Co.*, 117 U. S., 34, apply with great force to the case before the court. In this case, it appears that, by the constitution of the

state of Tennessee, all property is taxed *ad valorem*, but with a proviso that the legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. By an act passed in 1877 it was provided: "that the running and using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads on which they are run or used, is declared to be a privilege;" * * * and the companies were required to pay to the comptroller by the first day of July in each year, for each car so run or used, the sum of fifty dollars; and in default of its payment, the comptroller could enforce the collection of the tax by distress warrant.

Under these acts a large tax was assessed on the cars of the defendant company ($50 on each for several years).

The facts show that the company was domiciled in Kentucky, and had no property in Tennessee, except its Pullman cars, and that these cars were leased to a railroad in Tennessee, and were used by it "in transporting passengers from other states into and across Tennessee, and from points in Tennessee to points in other states," as well as to and from points within the state. The court held the tax unconstitutional, and in its opinion states:

"The tax was not a property tax, because, under the constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by its value, but was an arbitrary charge. What was done by the plaintiff was taxed as a privilege, it being assumed by the state authorities that the legislature had the power under the constitution of Tennessee to enact the sixth section of the act of 1877, and that the plaintiff had done what that section declared to be a privilege.

"By the decisions of the supreme court of Tennessee, cited in the circuit court on the demurrer, it is held that the legislature may declare the right to carry on any business or occupation to be a privilege, to be purchased from the state on such conditions as the statute law may prescribe, and that it is illegal to carry on such business without complying with those conditions. In this case the payment of the tax imposed was a condition prescribed, without complying with which, what was done by the plaintiff was illegal.

"The tax was imposed as a condition precedent to the right of the plaintiff to run and use the 36 sleeping cars owned by it, as it ran and used them on railroads in Tennessee. The privilege tax is held by the supreme court of Tennessee to be a license tax, for the privilege of doing the thing for which the tax is imposed, it being unlawful to do the thing without paying the tax. What was done by the plaintiff in this case, in connection with the use of the 36 cars, if wholly a branch of interstate commerce, was made by the state of Tennessee un-

lawful unless the tax should be paid, and to the extent of the tax, a burden was placed on such commerce; and upon principle the tax, if lawful, might equally well have been large enough to practically stop altogether the particular species of commerce."

The constitution of North Carolina (Art. 5, Sec. 3), provides:

"Laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property, according to its true value in money. The general assembly may also tax trades, professions, franchises and incomes, provided that no income shall be taxed when the property from which it is derived is taxed."

Sec. 7. Every act of the general assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

Sec. 7, Schedule B, of chapter 323 of the acts of 1891, of North Carolina, (The Revenue Act) is in these words:

"The taxes in this schedule shall be imposed as license tax for the privilege of carrying on the business or doing the act named, and nothing in this schedule contained shall be construed to relieve any person from the payment of the *ad valorem* tax on his property, as required in the preceding schedule. The license issued under this act shall be for twelve months, unless otherwise specially provided in any section imposing a tax."

SEC. 21. On every commission merchant, broker or dealer buying or selling for another, one per centum on his commissions.

SEC. 22. Every merchant, jeweller, grocer, druggist or other dealer who shall buy and sell goods, wares and merchandise of whatever name or description, not specially taxed elsewhere in this act, shall, in addition to his *ad valorem* tax on his stock, pay as a license one-tenth of one per centum on the purchases in or out of the state," &c.

The fertilizer tax does not come under the *ad valorem* rule prescribed by the constitution. It is an "arbitrary tax." It was never intended to be a tax on business carried on in the state, because there is a special tax on the occupation of merchants and other traders in addition to the *ad valorem* property tax.

Every species of property whose *situs* is in the state is, by the constitution, to be taxed *ad valorem*. This excludes the idea of a property tax under the constitution, because the fertilizer charge is a specific tax.

All traders are required to pay a license tax, or a percentage on their purchases. This excludes the idea that it was intended as a tax on the business of any one whose domicile and whose business is within the jurisdiction of the state.

This tax is in the nature of a duty on such fertilizer as is brought into the state, or a charge for the privilege of selling such fertilizer. In either case it is a burden upon inter-state commerce, if it was intended by the framers of the act that it should apply to fertilizer brought into North Carolina from another state and which had not become mingled with the mass of property in the state.

The following cases sustain the position that the tax in question is a regulation of commerce:

Robbins *v.* Taxing District, 120 U. S., 489.
Juehler ~~Puehler~~ *v.* Taxing District, 145 U. S., 410.

from which it is distinguished:

Welton *v* Missouri, 91 U. S., 275.
Railroad Co. *v.* Husen, 95 U. S., 465.
Cook *v.* Pennsylvania, 97 U. S., 566.
Guy *v.* Baltimore, 100 U. S., 434.
County of Mobile *v.* Kimball, 102 U. S., 691.
Webber *v.* Virginia, 103 U. S., 344.
Moran *v.* New Orleans, 112 U. S., 69.
Walling *v.* Michigan, 116 U. S., 446.
Wabash R. R. Co. *v.* Illinois, 118 U. S., 557.
Fargo *v.* Michigan, 121 U. S., 230.
Corson *v.* Maryland, 120 U. S., 502.
Phil. & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S., 326.
Asher *v.* Texas, 128 U. S., 129.
Stoutenburgh *v.* Henneet, 129 U. S., 141.
Lyng *v.* Michigan, 135 U. S., 161.
McCall *v.* California, 136 U. S., 104.
N. & W. R. R., *v.* Pennsylvania, 136 U. S., 114.
Crutcher *v.* Kentucky, 141 U. S., 47.
Brennan *v.* Titusville, 153 U. S., 289.

The plaintiff is a Maryland corporation and has its domicile at Baltimore. The guano had been shipped by the plaintiff from Baltimore, through Virginia, to North Carolina, and it was about to ship more in order to meet the requirements of its trade. The *situs* of this fertilizer was in Maryland; before it could acquire a *situs* in North Carolina certain requirements of the statute were to be complied with. The tax was to be paid and tags, stating it was paid, were to be attached to each bag, barrel or package. (Sec. 2190; record, page 4.)

Besides, every bag, barrel or package offered for sale in the state was to have the label or stamp printed on it, of which a copy was to be filed with the Commissioner, together with a sample of the fertilizer at or before delivery to agents, dealers or consumers in the state.

It was necessary to comply with all of these requirements before the fertilizer could be "delivered to agents, dealers and

consumers in the state," * * * and any person who should sell or offer for sale any such fertilizer, without compliance therewith, became liable to indictment, and the fertilizer to seizure and condemnation, (sec. 2190), and all persons were forbidden to sell, or offer for sale or remove, and agents of railroad and other transportation companies were forbidden to deliver the fertilizer until the labels, stamps and tags were attached, under heavy penalties. (Sec. 2193.) So, until all of these matters were complied with, the *situs* of the fertilizer could not be changed. It could not become domestic commerce until it was done, and, as a corollary, could not become within the political jurisdiction of the state.

In *McCulloch* v. *Maryland*, 4 Wheat., 316–427, Chief Justice Marshall, delivering the opinion of the court, says: "All subjects over which the sovereign power of the state extends are objects of taxation, but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced as self-evident." Cited in *Gloucester Ferry* v. *Pennsylvania*, 114 U. S., 206, 207.

The effect of the tax is to intercept an article imported into the state from another state, and on its way to be incorporated with the mass of property in the state. It is the property of the shipper or importer until it is paid. Its identity is not lost, its bulk is not broken; it has never reached the retailer. It is an interference with a restriction upon traffic among the States. It is a matter of indifference whether it be called a charge or a tax. It is a device to raise money, and as such is a burden upon commerce. It is laid on the fertilizer, and is to be paid while it remains in the original package, and is to be collected before the article loses its identity and becomes incorporated with the general mass of property in the state. Until the tax is paid and the tags are affixed, it is not within the jurisdiction of the state, but, in contemplation of law, is in transit from Maryland to North Carolina.

If any other construction be put upon the act, the fertilizer would have been subject to taxation in Virginia while passing through that state as well as North Carolina.

The case of *Coe* v. *Errol*, 116 U. S., 517, distinguishes domestic commerce from commerce in transit from one state to another or interstate commerce. The plaintiff in that case and his associates, were the owners of a number of spruce logs, which had been cut in New Hampshire and placed in a stream, near Errol in that state, to be from there floated down the Androscoggin river to Maine to be manufactured and sold; another lot of logs out in Maine were on their way to Lewiston, Maine, to be manufactured, but were detained in Errol by low water. Both classes of logs were assessed for taxation by the selectmen of Errol. The supreme court of New Hampshire held that the logs cut in Maine were not liable to taxation under the laws of

the former state, and that point was not raised in the supreme court of the United States. The question as to the others was, "Are the products of a state, though intended for transportation to another state, and partially prepared for that purpose by being deposited at a place or port of shipment within the state, liable to be taxed like other property within the state?' (Page 524.)

"This question does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water, or other cause of delay. * * Such goods are already in the course of commercial transportation, and are clearly under the protection of the constitution. And so, we think, would the goods in question be, when actually started in the course of transportation to another state, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the state of their origin to that of their destination—when the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entreport for that particular region, whether on a river or a line of railroads; such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the state. (Page 525.)

The court further said: "But no definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state, will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey." (Page 527.)

"Whenever a commodity has begun to move as an article of

trade from one state to another, commerce in that commodity between the states has commenced."

The Daniel Bull, 10 Wall., 557–565.

And it may be added, it does not terminate till it is delivered by the carrier to the consignee at the point of destination.

The fertilizer manufactured by the plaintiff in Baltimore was, when manufactured and up to the time when it was delivered to the carrier at Baltimore to be shipped to North Carolina, domestic commerce within the jurisdiction of the state of Maryland and subject to be taxed as other property in that state. As soon, however, as the plaintiffs had delivered it to the carrier for shipment, its character changed and it became inter-state commerce. It was in this condition when it passed through Virginia and entered the state of North Carolina. It was so while under the control of the carrier, and could not have been divested of that character without an actual delivery of it to the consignee for sale, then it would have become domestic commerce of North Carolina, and then and not till then could it have become mingled with the mass of property of the state, and so within its jurisdiction and liable to be taxed as other property in the state.

It was in transit and not a commodity for sale in the state when seizure was threatened. It was not, under the act, in a condition to be sold, or offered for sale, or moved by the transportation companies, or delivered or to be delivered to agents, dealers or consumers, because the tax was not paid and the article was not labelled and tagged. So, then, the tax is an obstacle to freedom of trade among the states, which might easily become a prohibition. The legislature could increase it from twenty-five cents to five dollars per ton, if it has the constitutional right to impose it at all, and this would exclude such fertilizer as is manufactured in other states from the market in North Carolina.

It can by no means be maintained that as soon as merchandise crosses the state line, it becomes subject to the internal regulations of the state as domestic commerce, for this would lead to the absurdity that articles in transit from one state to another would have one character in one state and a different one in another, nor can it be claimed that its character is changed when it reaches its destination and before delivery to the consignee and mixed with the mass of property in the state.

It is in transit until the carrier parts with control over it and its character as interstate commerce is not changed till it becomes an article ready for sale or for use in the state into which it is brought.

The prohibition in the statute against the removal of the fertilizer is a barrier to its entrance into the state, and prevents it from being mixed with the mass of property. This provision

takes effect on the transportation companies the very moment, when the merchandise reaches the state line and before it comes within the jurisdiction of the state. It then is impossible without violating this provision of the law to introduce the article into the state. A custom-house officer could do no more.

The payment of the tax gives the right to introduce it into the state and to sell it after it is introduced. Till this is done, there is no right to do either.

Brown *v.* Maryland, 12 Wheat., 436.

It is a fact in our case that the tax affected the fertilizer of the plaintiff, while it was in the original package and before it become mingled with the mass of property in the state.

The leading case on this subject is *Brown* v. *Maryland, supra.* In that case the question was, whether a license tax could be imposed by a state legislature on an importer of certain foreign articles by bale or package and other persons selling the same by wholesale, bale or package, etc.

Chief Justice Marshall, delivering the opinion, says: "The indictment is against the importer for selling a package of dry goods in the form in which it was imported without a license. This state of things is changed if he sells them or otherwise mixes them with the general property in the state, by breaking up his package and travelling with them as an itinerant peddler. In the first case the tax intercepts the import, as an import on its way to be incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege, which he has purchased from the United States until he shall have also purchased it from the state." Page 443.

It may be said when the principles so laid down by the Chief Justice are applied to interstate commerce that they deny to the importer the privileges of free commercial intercourse conferred on him by the constitution of the United States until he shall have purchased it from the state. The same rule applies to interstate commerce.

The original package case, *Leisey* v. *Hardin* (135 U. S., 100), decides that a law of the state of Iowa, which prohibits the sale of intoxicating liquors within the state, is void, in so far as it prohibits the sale of liquors by a foreign or non-resident importer on the packages in which they are brought from another state, being in conflict with the provision of the constitution vesting in congress the power to regulate commerce between the states.

Chief Justice Fuller, in delivering the opinion of the court, says: "The power vested in congress to regulate commerce with foreign nations and among the several states, and with

the indian tribes, is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of these articles which it introduces, so that they may become mingled with the common mass of property within the territory intended."

"Gibbons *v.* Ogden, 9 Wheat., 1.
"Brown *v.* Maryland, 12 Wheat., 41, 419."

"And while by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action."

The court held that ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity, and are so recognized by the commercial world, the laws of congress and the decisions of the courts, and that the plaintiffs had the right to import this beer into Iowa, and the right to sell it, "by which act alone it would become mingled with the mass of property in the state."

The fertilizer in the case before the court was interstate commerce when it began its journey from Baltimore. It will hardly be claimed that it lost its character as such while passing across Virginia, or that it lost it when it crossed the northern border of North Carolina. If it be true, as laid down in the case last cited, that until the original packages are sold, the article imported does not become mingled with the mass of property in the state, then it was clearly impossible for the fertilizers ever to become such, unless the conditions imposed by the act were complied with. The Iowa statute did not prescribe that the beer should not be sold, or offered for sale, before certain conditions were complied with, but simply declared the manufacture and sale of liquors unlawful.

There was also a provision in the Iowa act which forbade any common carrier to bring within the state of Iowa for any person or persons, or corporation, any intoxicating liquors from any other state or territory, without a certificate from the auditor of the county to which the liquor was to be transported that the person to whom it was to be delivered was authorized to sell intoxicating liquors in such county. This provision was held unconstitutional in *Bowman* v. *Railway*, 125 U. S., 465. See also, *Cooley* v. *Board of Wardens*, 12 How., 299.

Welton *v.* State, 91 U. S., 275.
Walling *v.* Michigan, 116 U. S., 446.
Railroad *v.* Husen, 95 U. S., 465.
Cook *v.* Pennsylvania, 97 U. S., 566.

In this case a state law which required auctioneers to collect and pay into the state treasury a tax on their sales, when applied to imported goods in the original package by them sold for the importer, was held void. So, also, a statute intending to regulate, or to impose any other restrictions upon the transmission of persons or property or telegraphic messages from one state to another. *Railway Co.* v. *Illinois*, 118 U. S., 557; and Drummer's Case, *Robbins* v. *Taxing District*, 120 U. S., 489.

In *Mobile* v. *Kimball*, 102 U. S., 691, it is said: "The subjects indeed upon which congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale and exchange of commodities. Here, there can, of necessity, be only one system or plan of regulation, and that congress alone can prescribe."

In *Brown* v. *Houston*, 114, U. S., 622, the coal was assessed for taxation under the general law of the state, it being held in New Orleans for sale. The court upheld the law and stated: "It (the tax) was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880) as all other property in the city of New Orleans was taxed."

This decision was put upon the ground that the coal had acquired a *situs* in Louisiana, was mingled with the general mass of property and was within the jurisdiction of the state for taxation under the general law. There was no tax imposed the payment of which was necessary to confer a license to sell. It was, when assessed, already "for sale."

The court says in *Leloup* v. *Mobile*, 127 U. S., 640: "We may here repeat what we have so often said before, that this exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state as the property of other citizens is taxed, nor from regulating matters of

local concern which may incidentally affect commerce, such as wharfage, pilotage and the like."

It will not sustain a tax if it is specialized as to operate as a discriminative burden against the introduction and sale of the products of another state or against the citizens of another state.

Walling *v.* Michigan, 116 U. S., 461.

In no sense can it be claimed that the tonnage tax is the same as the tax upon the people generally. It is not an ad valorem tax as the constitution requires. For section 9, act of 1891, chapter 9, reads: "Whenever any manufacturer of fertilizer or fertilizing material shall have paid the charges hereinbefore provided, his goods shall not be liable to any further tax whether by city, county or town."

This section does not exempt it from a further tax by the state, if the state should see fit to impose one, but from taxation by counties, cities and towns. By the laws of North Carolina counties, cities and towns have extensive powers of taxation. So far as the former is concerned it is provided in section 5, article C, of the state constitution, that "The taxes levied by the commissioners of several counties for county purposes, shall be levied in like manner with the state taxes, and shall never exceed the double of the state tax, except for a special purpose, and with the approval of the general assembly."

It will thus be seen that the fertilizer tax is specialized to a degree that makes it void, when assessed against property brought into the state from another state for sale as in the case before the court.

This tonnage tax is purely a revenue measure, as much so, as any of the duties laid down in the *McKinley* and *Wilson* tariff laws.

So far as the effect of the act is to be considered, whatever may be the motive for a tax whether revenue restriction, retaliation or protection to domestic manufactures, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports.

Walling *v.* Michigan, 116 U. S., 458, quoting from *State* v. *North*, 27 Missouri, 464.

The case of *Plumley* v. *Massachusetts*, 155 U. S., 461, brought up for consideration a law of the state of Massachusetts entitled "An act to prevent deception in the manufacture and sale of importation butter."

By this statute any person who shall sell, offer to sell, expose for sale, or have in his possession with intent to sell, any compound or article in imitation of pure yellow butter, shall be subject to fines and penalties therein prescribed. The plaintiff was arrested for violation of the act and convicted of a misdemeanor.

His offense consisted in selling one package of oleomargarine, designed to take the place of pure butter, manufactured from cream. It was manufactured by a firm in Chicago and sold by him, as their agent in Massachusetts. The court sustained the act. Judge Harlan delivering the opinion, says: "It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. * * * * * * * Now the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear what it is not."

* * * * * * * He is only forbidden to practice in such matter a fraud upon the general public."

He cites and distinguishes *Leisy* v. *Hardin*, 135 U. S., 100. He says, "It is sufficient to say of *Leisy* v. *Hardin*, that it did not in form and in substance present the particular question now under consideration. The article which the majority of the court held could be sold in Iowa in original packages, the statute of that state to the contrary notwithstanding, was beer manufactured in Illinois and shipped to the former state, to be there sold in such packages. So far as the record is disclosed, and so far as the contention of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer." In our case, the fertilizer was what it appeared to be—genuine fertilizer.

The decision in *Leisy* v. *Hardin* has never been overruled, so far as the principle involved is concerned.

It is true that congress, by the Wilson bill, passed in 1890, by restricting the freedom of commerce between the states, in that particular, places spirituous, vinous and malt liquors imported in unbroken packages into a state, under the police regulations of that state; but the act of congress had no other effect, and did not extend to and embrace in its operation any other article of interstate traffic or merchandise. As to fertilizers and other commodities, that freedom of intercourse remains unchanged.

Wilkinson *v.* Rahrer, 140 U. S., 545.

The Wilson act is a recognition of the principles laid down in *Leisy* v. *Hardin*. It is cited with approval in *Brennon* v. *Titusville*, 153 U. S., 289, which was decided in 1893.

The power to regulate foreign and interstate commerce is vested exclusively in congress; nor is this control over commerce between the states lessened by the failure of congress to pass any law respecting it. The silence of congress on the subject means that it shall be free from interference by the states.

Passenger cases, 7 How., 233.
Gibbon *v.* Ogden, 9 Wheat., 1.
Mobile *v.* Kimball, 102 U. S., 691.
Wallen *v.* Michigan, 116 U. S., 455.
Philad. & Southern S. S. Co. *v.* Penn., 122 U. S., 326.
Bowman *v.* Chicago & N. W. R. R., 125 U. S., 465.

The tonnage tax is a tax on the sale of the article, and therefore a tax on the article itself while in transit.

Brown *v.* Maryland, 12 Wheat., 441.

III.

THE SECOND ASSIGNMENT OF ERROR IS:

II. "That it (the court below) held that said charge or tax is not repugnant to so much of sub-section two of section ten of article one of said constitution, as provides that 'no state shall, without the consent of congress, lay any imposts or duties on imports and exports, except what may be absolutely necessary to execute its inspection laws,' and is therefore null and void."

The tonnage charge or tax on the sale of the article, is a license tax, and a tax on the fertilizer itself.

In *Ward* v. *Maryland*, 12 Wallace, 418, at page 432, Mr. Justice Bradley, in his concurring opinion, referring to the license tax therein considered, says: "It is, in fact, a duty upon importation from one state to another under the name of a tax."

In *Brown* v. *Maryland*, 12 Wheat, at page 263, referring to the license required of importers of foreign merchandise, the court says: "An impost or duty on imports, is a custom or tax levied on articles brought into a county, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before entering the port, does not limit the power to that state of things, nor, consequently, the prohibitions, unless the true meaning of the clause so confines it. What then are imports? The lexicon informs us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves, which are brought into a country. A duty on imports, then, is not merely a duty on the act of importation, but a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it had entered the country." This has reference to a tax on foreign commerce.

In the case of *Woodruff* v. *Parham*, 8 Wall, 129, it was held that the term "imports" in the clause in the constitution which declares that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one state to another, but only to articles imported from foreign contries into the United States." This meaning of the term is also adopted in *Brown* v. *Houston*, 114 U. S., 622, and in *Coe* v. *Erral*, 116 U. S., at page 527, and in *Leisy* v. *Hardin*. These cases hold substantially that a tax, which would be an import if applied to foreign commerce, is, when imposed on articles imported from one state into another, a regulation of commerce.

IV.

THE THIRD ASSIGNMENT OF ERROR IS:

III. "That it (the court below) held that said charge or tax is an inspection law within the contemplation of said clause of said constitution, and therefore constitutional and valid."

The portions of the constitution referring to this subject are the following:

"The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare ot the United States; but all duties, imposts and excises shall be uniform throughout the United States." Art. 1 Sec. 8.

Section 10 (1) embraces the absolute prohibition upon state legislation.

Sec 10 (2) embraces the qualified prohibitions, and is in these words: "No state shall, without the consent of congress, lay impost or duty on imports and exports, except what may be necessary to execute its inspection laws, and the net produce of all duties and imposts laid by any state on imports and exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to revision and control of the congress."

It is plain from the above clause that the congress alone has the power to lay any duty either on imports ~~or exports~~ for the purpose of raising revenue. It may do so to "pay the debts and provide for the common defense and general welfare of the United States." If a state has the power to impose any duty at all it is for the purposes of inspection alone, and not for revenue purposes.

The circuit court conceded that the imposition cannot be sustained as a tax on merchandise, but held that it can be sustained as an inspection law.

On page 28 of the record, Judge Seymour, who delivered the opinion, says: "In the very recent case of *Vaight* v. *Wright*,

141 U. S., 62, Bradley, Judge, in rendering the opinion of the court, says: 'The question is still open as to the mode and extent in which state inspection laws can constitutionally be applied to personal property imported from abroad or from another state.' * * * * * * * * The point must necessarily be discussed in the decision of this case."

We have seen that the exclusive right to lay a duty on imports for the purpose of raising revenue rests in congress, and that there is a prohibition upon the states in that respect. The states under the confederation could lay duties on all merchandise imported from another state or from a foreign country.

It were needless to recur to the causes that led to the convention which framed the constitution, but, conspicuous among them was this—the abuse of the power of inter-state taxation. It was on this account that congress was given the exclusive control over the subject.

It is easily deducible from historic facts, that it must have been the intention of the framers of the constitution to limit and abridge the rights of the states in laying duties as much as it was in their power to do so, without depriving them of the right to manage their internal affairs in their own way. There was no method by which this could be accomplished without withholding from the states all power to impose duties on articles coming from other states. They could not have intended that New York could impose a duty on commerce going into that state from North Carolina under the name of an inspection law, which would be a burden on that commerce (and it may be said that every duty is a burden), but they intended simply that the state should have the right to pass necessary inspection laws, and that no property could be taxed under these inspection laws unless its *situs* was in the state and it was mingled with the mass of property in that state. It is impossible to conceive of a duty that would not be a restriction or burden upon commerce.

To pass inspection laws is one of the reserved powers of the states, but no greater rights were reserved than those which were exercised by the states at the time when the constitution was adopted. The right, then, to pass inspection laws must be confined to such laws as were passed during the colonial period, or the period of the confederation. There can be found no law imposing a duty on imports for inspection purposes during these periods.

The Federalist, No. 32.

The act of laying duties or imposts on imports or exports is considered in the constitution as a branch of the taxing power and not of the power to regulate commerce.

They are substantive provisions. "This prohibition, then, is

an exception from the acknowledged power of the state to levy taxes, not from the questionable power to regulate commerce."

Gibbons *v.* Ogden, 9 Wheat., 11.

"The restrictions, then, are on the taxing power not on that to regulate commerce. * * * * * * *

But the inspection laws are said to be regulation of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the states.

That inspection laws may have a remote and considerable influence on commerce will not be denied, but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general governments, and which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

Ibid, 12.

It will be observed that there is no reference to any duty or tax on the article imported, but the inference is that no such duty can be imposed as an inspection tax. The object of these laws is to prepare an article produced in the state for exportation or domestic use. They act on it before it becomes an article of interstate or foreign commerce and prepare it for that purpose. Thus it must necessarily follow that the property thus acted upon and prepared must be within the jurisdiction of the state. If its effect is to tax property in the state before it becomes interstate commerce, it must follow that it cannot affect interstate commerce which is in transit to the State. It is worthy of observation that the laws, with which inspection laws are associated in the foregoing extract, relate to subjects peculiarly within the jurisdiction of the state.

The tenth amendment to the constitution provides that "All powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In another clause, the exclusive right to lay duties on imports and exports for revenue purposes is conferred on the Congress. The states reserved the right to adopt inspection laws or laws for the purpose of improving and preparing articles for

the domestic or foreign market. The articles must at the time of the inspection be within the jurisdiction of the state.

Voight *v.* Wright, 141 U. S., 62.
Leisey *v.* Hardin, 135 U. S., 100.

At page 438, the case of *Brown* v. *Maryland* contains the following: "A duty on imports, then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it is understood. The limitation is, 'except what may be absolutely necessary for executing its inspection laws.'"

Now, the inspection laws, so far as they act on articles for exportation, are generally executed on land before the article is put on board the vessel; so far as they act upon importations, they are generally upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. That is, while it mingled with the mass of property in the state.

"The states have the undoubted right 'to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government, but whenever the law of a state amounts essentially to a regulation of commerce with foreign nations, or among the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to be an article of trade between one state and another, or another country, and thus it comes in conflict with a power, which, in this particular, has been exclusively vested in the general government, and is therefore void."

The tonnage tax is a tax on imports and comes in direct conflict with this exclusive power vested in congress. It indirectly inhibits the receipt and sale of an imported commodity by imposing the tax.

It imposes a burden or restriction upon an article when it is on its journey from Maryland to North Carolina and before it has reached its destination, and is an encroachment upon the commercial power of the congress. The fact the imposition is a small sum on each ton of fertilizer, does not vary the application of the rule.

Says Marshall, C. J., in *Brown* v. *Maryland, supra*, at page 439: "There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none

were sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer."

"It is obvious that the same power which imposes a light duty, can impose a very heavy one—one which amounts to a prohibition."

"Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it may be placed; and, at page 442, "referring to the thing imported." But while remaining the property of the importer in his warehouse in its original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the constitution."

"Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe a regular means for accomplishing that introduction and incorporation."

Brown *v.* Maryland, 12 Wheat, 448.

"If the states may tax all persons and property found in their territory, what shall restrain them from taxing goods in their transit through the state from one part to another for the purpose of re-exportation?"

Ibid, 449.

Under the articles of confederation there was no restriction upon the power of the several states to tax foreign or interstate commerce except the following provision in Article 6:

"No State shall lay any imposts or duty which may interfere with any stipulations in treaties entered into by the United States and congress assembled with any king, prince or state in pursuance of any treaties already proposed by congress to the courts of France and Spain."

Article 8 provided "that all charges of war and expenses that should be incurred for the common defence and general welfare of and allowed by the United States in congress assembled should be defrayed out of a common treasury, which should be supplied by the several states in proportion to the value of all land within each state; * * * and said taxes should be laid and levied by direction of the legislatures of the several states."

So the only prohibition of taxation by the States were those interfering with treaty stipulations.

In order to meet the requisitions of the federal government, and to defray the expenses of the state governments, the power

of the state, with that exception, to tax, directly or indirectly, was unlimited.

It was in the power of any state to exclude the products of any other state from entering its limits by such taxes as would be entirely prohibitive, and this was one of the main evils which it was intended by the framers of the constitution that it should do away with. In other words, the constitution established freedom of trade among the states.

Wilkinson *v.* Rahrer, 140 U. S., 545.

"The great benefit, however, to be derived from a national regulation of commerce, a benefit in which all the states would equally share, whatever might be their productions, was, undoubtedly, the removal of existing and injurious relations which the states had hitherto produced against each other."

2 Curtis on the Constitution, page 291.

In the case of *People* v. *Compagnie General Transatlantique* p. 59 of 107 U. S., Mr. Justice Miller, delivering the opinion of the court, says: "What laws may be properly classed as inspection laws under the provisions of the constitution must be determined largely by the nature of the inspection laws of the states at the time the constitution was framed." He refers to the statutes cited in *Turner* v. *Maryland*, and *Gibbons* v. *Ogden*. An examination of these and other statutes failed to disclose that any inspection charge or duty was ever laid on any article imported into a state. The inspectors were paid a regular salary in some cases, and in others the expenses of inspection were paid by owner or purchaser of the property, but this was done while the property was in the bosom of the state, in order to prepare it for exportation or domestic use, but never after it was in transit from the state to some foreign country or another state. That is, the charges were levied upon the article before it was delivered to the carrier for shipment and consequently before it became an article of inter-state or foreign commerce."

See Coe *v.* Errol, 116 U. S., 517.

In the case *Turner* v. *Maryland*, 107 U. S., 51, the court adopts the remarks of C. J. Marshall, in *Gibbons* v. *Ogden*: "The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose." And on page 52 says: "In view of such legislation existing at the time the constitution of the United States was adopted and ratified by the original states, known to the framers of the constitution who come from the various states, and called inspec-

tion laws in these states, it follows that the constitution, in speaking of 'inspection laws,' included such laws, and intended to reserve to the states the power of continuing to pass such laws, even though to carry them out, and make them effective, in preventing the exportation from the state of the various commodities unless the provisions of the laws were observed, it became necessary to impose charges which amounted to duties or imposts on exports to an extent necessary to execute such laws." There is no reference here or in any other case to duties on imports, and in this case the duty was collected when the property was within the jurisdiction of the state.

The inspection laws of North Carolina before and at the time of the adoption of the constitution no doubt afford a fair sample of the other states. At that time the only articles required to be inspected was tobacco and a few other commodities. The inspectors were appointed by the inferior courts of the several counties. These statutes related to the preparation of domestic produce for exportation or domestic use, and the inspectors were paid by the counties. Rev. Statutes 1820, c. 120, c. 206. These acts were passed in 1777 and 1784.

Inspection laws are not, properly speaking, regulations of commerce. Their object is to improve the quality of articles produced by the labor of the country, and to fit them for exportation or domestic use.

All of the laws referred to in *People* v. *Compagnie General* and *Gibbons* v. *Ogden*, related to the preparation of domestic articles at home or for exportation.

These statutes are instances of the exercise by the states of the power to act upon an article grown and produced in a state before it becomes an object of foreign or domestic commerce.

Inspection laws act upon the subject before it becomes an article of foreign commerce or commerce among the States and prepared for that purpose.

Brown *v.* Maryland, 12 Wheat, 50.

The general law of North Carolina in regard to inspections have reference to the inspection of articles to prepare them for exportation.

2 Code of North Carolina, 2982.

It would be going very far to say that the state of North Carolina can declare that a bag of guano manufactured in Maryland and owned by a citizen of that state and shipped to North Carolina, and *in transitu*, is not an article of commerce, and this, too, before it is within the jurisdiction of the last-named state. Inasmuch as an inspection law has reference, according to general usage, to articles being prepared for exportation, and these articles are not commerce until they are inspected, and

this inspection is to be made before separated from the mass of property in the state, does it not follow that inspection laws cannot apply to articles imported into the state before they become mingled with the mass of property in the state, unless an inspection law affecting imports is a mere police regulation? This is very clearly intimated in the Virginia case, *Voight* v. *Wright*, 141 U. S., at page 63, which says: "The question is still open as to the mode and extent in which the state inspection laws can constitutionally be applied to personal property imported from abroad or from other states, whether such things can go beyond the identification and regulation of such things as are directly injurious to the health and lives of the people, and therefore not entitled to the protection of the commercial power of the government."

This court, in *New York* v. *Miln*, 11 Peters, at page 143, says: "The power to pass inspection laws, involves the right to examine articles which are imported, and are therefore directly the subject of commerce, and if any of them are found to be unsound or infectious, to cause them to be removed or even destroyed. But the power to pass these inspection laws is itself a branch of the general power to regulate internal police."

Passenger Cases, 7 How., 401.

In the case of *Leisey* v. *Hardin*, 135 U. S., 100, Chief Justice Fuller, discussing the question of interstate commerce, says:

"The power vested in congress 'to regulate commerce with foreign nations and among the several states and with the indian tribes' is the power to prescribe the rule by which that power is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.

Gibbons *v.* Ogden, 9 Wheat, 1.
Brown *v.* Maryland, 12 Wheat., 419.

And while by virtue of its jurisdiction over person and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the constitution, is not within the jurisdiction of the police power of the state, unless placed there by Congressional action.

Henderson *v.* Mayor of N. Y., 92 U. S., 259.
Railroad *v.* Husen, 95 U. S., 465.

Walling *v.* Michigan, 116 U. S., 446.
Robbins *v.* Taxing District, 120 U. S., 489.

The power to regulate commerce among the states is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances, until congress otherwise directs; but the power thus exercised by the state is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local inter-communication, to the progress and development of local prosperity and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the constitution, reserved by the states, except so far as falling within the scope of a power confided to the general government, when the subject-matter requires a uniform system as between the states, the power controlling it is vested exclusively in congress, and cannot be so encroached upon by the states, but, when in relation to the subject-matter different rules may be suitable for different localities, the states may exercise powers, which though they may be said to partake of the nature of the power granted to the general government, are not strictly such, but are simply local powers which have full operation until or unless circumscribed by the action of congress in effectuation of the general power."

Cooley *v.* Board of Wardens, 12 How., 299.

The Chief Justice places inspection laws among local laws, and it is conceded that an inspection law does not come under the rule of uniformity. Its mission is to prepare commodities for domestic or foreign use; that is, to make them marketable. There can be no necessity for the same laws in North Carolina and Georgia, but the tax or charge which we are considering is not of that character.

Fertilizers constitute a most important branch of commerce. So much so that by the Wilson tariff act they are admitted free of duty. Commerce in them is carried on largely with foreign nations and among the states. The charge or burden imposed on them affects their market value. The price will rise or fall as the charge may be higher or lower. The state of North Carolina imposes a tax of twenty-five cents per ton, the state of Georgia ten cents, the state of Virginia nothing. The rational result is that the foreign manufacturers can sell at a cheaper rate in Georgia than in North Carolina, and cheaper still in Virginia. The amount of the tax per ton is small, but amounts to a good deal when large quantities of fertilizers are

imported. The Wilson tariff bill imposes a duty of one dollar per ton on plaster of paris imported from abroad. Why is not the fertilizer tax as much a tariff duty as the tax on the plaster of paris? Suppose the amount of that were also one dollar per ton, what is the difference in principle?"

The Chief Justice further says, in *Leisey* v. *Hardin:* "That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world. The laws of congress and the decisions of the courts are not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of congress, prohibit their importation from abroad or from a sister state? or, when imported, prohibit their sale by the importer? What is there in this case that does apply to our case? There is not an express prohibition on importation, but there is an express provision that the fertilizer cannot be sold until the charges are paid and the tags are affixed. A contrary view would give the state of Virginia, through which the fertilizer passes in its route from Baltimore to North Carolina, a right to tax the fertilizer.

Passenger Cases, 7 How., 445–446.

In 1865, the legislature of Nevada enacted that there should be levied and collected a capitation tax of one dollar upon every person leaving the state by a railroad, stage coach or other vehicle engaged or employed in the business of transporting persons for hire, which was held unconstitutional by this court. The court says, at page 46, "It will be observed that it was not the extent of the tax in that case which was complained of, but the right to levy any tax of that character.' So in the case before us, it may be said that a tax of one dollar for passing through the state of Nevada by the stage coach or railroad cannot sensibly affect any function of the government or deprive a citizen of any valuable right, but if the state can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one state can do this, so can every other state, and thus one or more states, covering the only practicable routes of travel from the east to the west or from the north to the south, may totally prevent or seriously burden all trans portation of passengers from one part of the country to the other."

Crandall *v.* Nevada, 6 Wall., at page 46.

See, also:

Passenger Cases, 7 How., at page 404.

"The rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admitting of one uni-

form system or plan of regulation, this may justly be said to be of such a nature as to require exclusive legislation by congress. * * * * * * * Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportations, every other may, and thus commercial intercourse between states remote from each other may be destroyed.

Bowman *v.* Chicago & N. W. Ry Co., 125 U. S., 465.

The court further says: "It is impossible to justify this statute of Iowa by classifying it as an inspection law. * * * * * * * The object of an inspection law," said Chief Justice Marshall, in *Gibbon* v. *Ogden*, "is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce among the states, and prepare it for that purpose."

"They are confined to such particulars as in the estimation of the legislature, and according to the customs of trade, are deemed necessary to fit the inspected thing for the market. It never has been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse." *Ibid.*

Welton *v.* Missouri, 91 U. S., 346.

In the case of *Covington* v. *Commonwealth*, 154 U. S., 204, it was decided that the state of Kentucky had no right to fix the fees of a bridge company for using a bridge extending across a navigable river from one state to another. The court says: "Congress has no right to interfere with police regulations relating exclusively to the internal trade of the states; that congress and the states have concurrent jurisdiction of laws regulating pilots, quarantine and inspection laws and the policing of harbors, the improvement of navigable channels, the regulation of wharves, pens and docks, the construction of dams and bridges across the navigable waters of a state and the establishment of ferries." In these cases so long as congress fails to act the state can proceed to do so. The court further says: That while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself.

Munn *v.* Illinois, 113 U. S., 113.
Chicago *v.* Iowa, 94 U. S., 155.
Ruggles *v.* Illinois, 108 U. S., 526.
Hall *v.* DeCuir, 95 U. S., 485.
Wabash *v.* Illinois, 118 U. S., 557.

In *Turner* v. *Maryland*, 107 U. S., p. 38, it is said, "No inspection was involved except that of tobacco grown in Maryland." The court says at page 50: "The thing required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among the states, and are to be done before it becomes such an article. * * *" The court then refers to *Gibbon* v. *Ogden*, and quotes with approval the definition of an inspection law given by it. At page 51: "The question as to whether the charges for such examination and its attendant duties are 'absolutely necessary' was not before the state court, and was not passed upon by it, and cannot be considered by this court."

The law acted upon the tobacco while it was in the bosom of the country and the charge was imposed before it had become an article of foreign or inter-state commerce. Under the terms of the act all of these requirements were to be complied with before it became an article of either sort. Had the "outage" applied to the article after it had been shipped or started on its journey it would have been a regulation of commerce.

Coe *v.* Errol, 116 U. S., 517.

The opinion in this case was written by Mr. Justice Blatchford. In it he stated: "Such a law is an inspection law, and may be executed by imposing a 'tax or duty of inspection,' which tax, so far as it acts upon articles for exportation, is an exception to the prohibition on the states against levying duties on exports, the exception being made because the tax would otherwise be within the prohibition. If this be so, then the duty on exports must be laid while the article is domestic commerce, and when it is about to become an article of foreign or inter-state commerce. This does not apply to our case, because in that the character of inter-state commerce is impressed upon it before the charge is levied.

Brimmer v. *Rebman*, 138 U. S., 78, is a case in which a statute of Virginia was declared unconstitutional, as discriminating against the products of other states. The court, however, said that if it had applied to all the states alike, this would not have brought it in harmony with the constitution. In this case there was an inspection fee assessed on meat.

The opinion cites:

Minnesota *v.* Barker, 136 U. S., 312.
Railroad *v.* Husen, 95 U. S., 465.
Walling *v.* Michigan, 116 U. S., 446.

The tonnage tax is a revenue law. The state has the right to pass inspection laws and to adopt police regulations, but no law imposing a burden on inter-state commerce will be upheld, although it appears in the guise of an inspection law.

Peet *v.* Morgan, 19 Wall., 581.

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Henderson *v.* Mayor of N. Y., 92 U. S., 259.
Brown *v.* Maryland, 12 Wheat., 436.

This principle is approved in *Minnesota* v. *Barber*, 136 U. S, 313, in which the court says:

"The presumption that this statute was enacted in good faith, for the purpose expressed in the latter, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it was repugnant to the constitution of the United States. There may be no purpose upon the part of the legislature to violate the provisions of that instrument, and yet a statute enacted by it under the forms of law, may by its necessary operation be destructive of rights granted or secured by the constitution. In such case the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void."

Henderson *v.* Mayor of N. Y., 92 U. S., 259.

Section 2193 of the North Carolina Code prohibits any merchant or other person to sell commercial fertilizers unless the labels and tags are attached thereto, as well as any person who shall remove the same, under a penalty or fine of ten dollars, and "any agent of any railroad or other transportation company who shall deliver any such fertilizer in violation of this section shall be guilty of a misdemeanor." Record, p. 6.

This is a penalty imposed upon freedom of commerce between the states. "Any person shall move, or any agent of a transportation company shall deliver," &c., refers to carriers. The prohibition on the agent is likewise a prohibition on the company.

These provisions are in conflict with Rev. Stat. U. S., sec. 5258, which provides that "every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any state to another, and to secure compensation therefor, and to

connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

This act was passed to remove trammels upon transportation between different states. Rev. Stat., sections 4252 to 4289, relate to transportation by water.

Railroad Company *v.* Richmond, 19 Wall, 584.
County of Mobile *v.* Kimball, 102 U. S., 691.
Bowman *v.* Railroad, 125 U. S., 465.

This case is not governed by the laws which relate to pilotage, half pilotage, quarantine and harbor laws, port duties, wharfage, the construction of bridges, and dams across navigable streams and the establishment of ferries.

These rules are not regulations of that portion of commerce, the regulation of which is exclusively vested in congress. They affect commerce remotely, and are rather aids to it than regulations of it, and are of a local concern. They are not national, and do not require uniformity of regulation.

Wilson *v.* Marsh Co., 2 Peters, 245.
Passenger Cases, 7 How., 402.
Cooley *v.* Board, 12 How., 299.
Conway ~~Conney~~ *v.* Taylor, 1 Black., 603.
Steamship *v.* Juliff, 2 Wall, 450.
Ex parte McNeil, 13 Wall, 236.
Cannon *v.* New Orleans, 20 Wall, 577.
Keokuk *v.* Keokuk, 95 U. S., 90.
Pound *v.* Turk, 95 U. S., 459.
N. W. Union P. Co. *v.* St. Louis, 100 U. S., 423.
Wilson *v.* McNomu, 102 U. S., 236.
Mobile *v.* Kimball, 102 U. S., 691.
Cincinnati *v.* Cattlesburg, 105 U. S., 559.
Escauaber *v.* Chicago, 107 U. S., 678.
Cardwell *v.* Bridge Co., 113 U. S., 205.
Gloucester Ferry *v.* Pennsylvania, 114 U. S., 203.
Morgan *v.* Louisiana, 118 U. S., 455.
Huse *v.* Glover, 119 U. S., 543.
Ouochita *v.* Aiken, 121 U. S., 444.
Leisey *v.* Hardin, 135 U. S., 100.
Lyle Gouf ~~Lamb~~ *v.* Mobile, 135 U. S., 340.

Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and

transit of persons and property, as well as the purchase, sale and exchange of commodities.

For the regulation of commerce as thus defined, there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country, can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language expressing the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce

Mobile *v.* Kimball, 102 U. S., 691.
Gloucester *v.* Pennsylvania, 114 U. S., 203.

When we speak of the power conferred on congress to regulate commerce as an exclusive power, it must be taken with the qualification that the commerce referred to is, "All that portion of commerce with foreign countries and between the states which consist in the transportation, purchase, sale and exchange of commodities."

Mobile *v.* Kimball, *supra.*

"The state may tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid on the commerce itself."

"But whenever such laws, instead of being of a local nature, and affecting interstate commerce but incidentally, are national in their character, the non-action of congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the third class of these laws wherein the jurisdiction of congress is exclusive."

Brown *v.* Houston, 114 U. S., 622.
Bowman *v.* Railroad Company, 125 U. S., 465.

That while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled to require the citation of authority.

This proposition was first laid down in *Crandall* v. *Nevada*, 6 Wall., 35, and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariff upon passengers or merchandise, carried from one state to another, is also settled by more recent decisions.

Covington *v.* Kentucky, 154 U. S., 204.

Fertilizer is an article of commerce as much as beer, spirits or any other article, and when in transit from one state to

another and, before it comes within the political jurisdiction of the state of its destination, is interstate commerce.

Now a charge or tax, which affects this fertilizer before it comes within the bosom of the state, must necessarily be a burden upon a regulation of interstate commerce, and not a local regulation, and as a consequence cannot be an inspection law.

Judge Seymour failed to distinguish between commerce itself and the instruments of and aids to commerce. The former, when interstate or foreign cannot be regulated or taxed by a state; the latter can be. The fertilizer tax is laid upon the article of commerce and not upon its incidents.

If, from its nature, the thing imported does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or in other words is ~~but~~ not a commercial article, then the state power may exclude its introduction, and as an incident to this power, a state may use means to ascertain the fact."

In re Rahrer, 140 U. S., 545.

A duty imposed by the states, in order to conform to the constitution and to be consistent with the exclusive power of regulation granted to congress, must be for the exclusive purpose of ascertaining whether or not the article does belong to commerce, and for no ulterior purpose.

In order not to conflict with this exclusive power it cannot be laid except to identify and regulate such things as are directly injurious to the health and lives of the people, and therefore not entitled to the protection of the commercial power of the government."

Voight *v.* Wright, 141 U. S., 62.

An inspection law is not of national, but of local concern, and does not require uniformity of regulation, and, as a corollary, when a tax, professing to be an inspection charge, is laid on any subject of interstate commerce (which necessarily is national in its character, and does require uniformity of regulation), it is unconstitutional. Fertilizers constitute a most important branch of commerce, and a tax laid on them, to be collected while they are on the way into the state and before they have left the hands of the carrier, must be a violation of the commerce clause of the constitution. Anything which amounts to a restriction upon their free access into the state disturbs the uniformity of regulation prescribed by the constitution. The imposition of a tax of twenty-five cents per ton in North Carolina, ten cents in Georgia, freedom from tonnage tax in Vir-

ginia, illustrate a gross violation of the rule of uniformity in regard to our taxation of an article of interstate traffic.

In *Bowman* v. *Chicago*, 125 U. S., 465, Mr. Justice Bradley says: "Where state laws alleged to be regulations of commerce have been sustained, they were laws which related to bridges or dams across streams wholly within the state, or police or health laws, or to subjects of kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one state to another is in its nature national, admitting of but one regulating power, and it was to guard against the possibility of commercial embarrassment which would result if one state could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the state, that the power of regulating among the states was conferred upon the federal government."

"If in the present case the law of Iowa operated upon all merchandise sought to be brought from another state into its limits, there could be no doubt that it would be a regulation of commerce among the states," and he concludes that this must be so, though it applied to one class of articles of a particular kind."

"It is impossible to justify this statute of Iowa by classifying it as an inspection law * * * * * * * The nature and character of the inspection laws of the states contemplated by this provision of the constitution were very fully exhibited in the case of *Turner* v. *Maryland*, 107 U. S., 38." The object of inspection laws is set forth in *Gibbons* v. *Ogden*.

"It is to improve the quality of articles produced by the labor of a country, to fit them for exportation or domestic use."

Mr. Justice Field, in *Leisey* v. *Hardin*, *supra*, says: "The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages. Under our decision in *Bowman* v. *Railway Company*, 125 U. S., 465, they had the right to import this beer into that state and in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state up to that point. * * * the state could not interfere by seizure or other action, in prohibition of importation and sale by the foreign or non-resident importer." * * * although, if at the same time if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

In *Cutcher* v. *Kentucky*, 141 U. S., 47, Mr. Justice Bradley, says: "There are undoubtedly many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce. * * * * while it is only such

things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of congress, yet when that power or some other exclusive power of the federal government is not in question, the police power of a state extends to almost everything within its borders."

An inspection tax, from the very nature of the object which it promotes, must necessarily be laid on property within the jurisdiction of the state. If it can be imposed in the shape of an impost duty, it must be on some object which does not bring the imposition into conflict with the commerce clause of the constitution. It must be akin or analagous to the fees levied for pilotage, quarantine," &c., which do not affect inter-state commerce but are aids to it, and which are intended to guard the safety, health and lives of the people, these are never imposed on the cargo.

Morgan *v.* Louisiana, 118 U. S., 455.

Inspection laws cannot affect inter-state commerce, except in so far as they may prevent the introduction into the state of something which would endanger the health or life of the people.

New York *v.* Miln, 11 Pet., 102.

Inspection of imports must relate principally to health.

Passenger Cases, 7 How., 401.

The tonnage tax professes to be laid "for the purpose of defraying the expenses connected with inspection of fertilizers and fertilizing material. (Record, p. 4.) There are various requirements to be complied with in order not to be entangled in the meshes of the law, and numerous penalties are prescribed for non-compliance with its provisions. It does not appear on the face of the act that its object is to separate the fertilizers in good condition from those which are spurious, but good, bad and indifferent alike come within its condemnatory provisions. If any person sells or offers for sale any fertilizer before the tax is paid and tags are affixed, "the fertilizer so sold or offered for sale shall be subject to seizure and condemnation in the same manner as is provided in this chapter for the seizure and condemnation of spurious fertilizers." (Sec. 7, record, pp. 4 and 5.) The proceedings for seizure and condemnation are prescribed in section 2192, record, page 5.

After setting forth the substance of the affidavit to be made, this section provides that the clerk shall issue his order to the sheriff * * * to seize and hold the fertilizer "until the defendant shall give bond in double the value, and the judgment shall be for double the value of the fertilizers." This is a con-

fiscation law. The purpose of the act, then, is not to ascertain what fertilizers are spurious, but to raise revenue by condemnation of the fertilizer, no matter what its condition may be.

It cannot be upheld as a police regulation, first, because it affects the sound as well as the spurious article; second, because, so far as it affects fertilizers imported into the state, it affects them before they become incorporated with the mass of property in the state.

Railroad *v.* Husen, 95 U. S., 465.
Henderson *v.* Mayor of N. Y., 92 U. S., 269.

The tax is to be paid and other requirements are to be performed while the fertilizer is in transit, or an article of inter-state commerce. No time for the inspection is mentioned in the act. So far as inter-state commerce is concerned, it may be made, under the act, either before or after delivery.

The constitution confers on congress the power "to regulate commerce among the states." This is an exclusive right so far as commercial articles or articles of traffic are affected. It also prohibits any state from laying "any duty of tonnage." Suppose, instead of laying a tax on fertilizer, the state had levied a duty of tonnage to pay the expenses connected with the inspection of fertilizers, would not this be void? If so, why not in our case, the commerce clause being equally prohibitive on the state.

Black's Handbook of American Constitutional Law, pages 271 to 273.

Under the general law contained in chapter 28, vol. 2 of the Code of North Carolina, it is provided that inspectors shall be appointed by the county commissioners, and their fees fixed by them. In this law there is no provision for the inspection of fertilizers. It relates exclusively to the preparation of tobacco and other articles therein named for exportation, and the inspection fees are to be paid by the exporter or purchaser.

The whole transaction relates to commerce within the jurisdiction of the state.

In the original act, imposing the license tax of $500 (Code N. C., sec. 2190), there is no reference to inspection, except in section 2196, in which it is provided that "the department of agriculture shall establish an agricultural experiment and fertilizer control station, and shall employ an analyst skilled in agricultural chemistry. It shall be the duty of said chemist to analyze such fertilizers and products as may be required by the department of agriculture, and to aid, as far as practicable, in suppressing fraud in the sale of commercial fertilizers." This is not changed by the act of 1891.

The fees for this analysis ought to have been paid out of the state treasury, but there is but a small quantity of fertilizer

manufactured in North Carolina, while there is a very large quantity imported into it from Baltimore, Richmond and other places outside of the state. So the legislature imposed this tax for the purpose of imposing on the non-resident manufacturers the burden of supporting the department. It is a discriminating tax.

"The congress shall have power to lay and collect taxes, imposts and excises."

Constitution, Art. 8, sec. 8, par. 1.

"No tax or duty shall be laid on articles imported from any state."

Art. 1, sec. 9, par 5.

"No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

Art. 1, sec. 10, par. 2.

The words "imposts, imports and duties" have the same meaning in each of said clauses, and refer to foreign commerce alone. This is the sense in which the word "impost" in the inspection clause is employed.

Brown *v.* Maryland, 12 Wheat, 419.
Woodruff *v.* Parham, 8 Wall, 123.
Brown *v.* Houston, 114 U. S., 622.
Coe *v.* Erral, 116 U. S., 517.

V.

THE FOURTH ASSIGNMENT OF ERROR IS:

IV. "That it (the court below) held that the said charge or tax is applicable by law exclusively to purposes of inspection of fertilizers and fertilizing materials, whereas it should have held that the same, upon the face of the various statutes relating to the subject, is applicable to purposes foreign to inspection, to-wit, to pay the salary of the analyst (Code, sec. 2196), the expenses of the geological museum and publication of the "Geology of North Carolina" (Code, sec. 2198), the expenses of preparing hand-books with illustrated maps, in regard to mines, minerals, forests, soils, climates and water powers, fisheries, mountains, swamps, industries and other statistics, to give information to immigrants, and to make expositions thereof and to offer premiums (Code, sec. 2199); the expenses of establishing and keeping a general land and mining registry (sec. 2201); expenses of the North Carolina Industrial Association, five hundred

dollars per year (sec. 2206); expenses of the North Carolina Industrial School (Agricultural and Mechanical College), five thousand dollars per year, (Acts 1885, ch. 308, sec. 4; Acts 1887, ch. 2110, sec. 1); the expenses of publication of geological reports, (Acts 1887, ch. 409, sec. 15)."

On page 26 of the record the opinion of the circuit court reads: "But it is contended by the plaintiff that the law under consideration in this case shows upon its face by various provisions made for the expenditure of the money collected under the law that the intention of the legislature was to collect a sum more than sufficient to pay the expenses of inspection." We do contend that on the face of the acts the money to be raised by this tax is to be appropriated to objects foreign to inspection, and as such were enacted for the purpose of raising revenue. The fact that it is called an inspection law cannot clothe it with that exclusive character when the evident effect of it is to raise a revenue to be appropriated to different objects "Nomenclature avails but little against the force of the context."

Section 2196 of The Code provides that "the department of agricultute shall establish an agricultural experiment control station, and shall employ an analyst * * * whose duty it shall be to analyze such fertilizers and products as may be required by the department of agriculture, and to aid as far as practicable in suppressing fraud in the sale of commercial fertilizers. He shall * * * carry on experiments on the nutrition and growth of plants, with a view to ascertain what fertilizers are best suited to the various crops of this state, and whether other crops may not be advantageously grown on its soil, and shall carry on such other investigations as the department may direct. He shall make reports. * * * His salary shall be paid out of the funds of the department of agriculture."

Sec. 2198 provides "that the geological survey is hereby made and constituted a co-operative department with the department of agriculture, and the geological museum and the collections therein shall at all times be accessible to the said department. The geologist shall prepare * * illustrations of the agricultural industries, products and resources of the state * * abstracts of the survey * * in illustration of the advantages of this state and in promotion of the general purposes of immigration. In return for such service the state geologist may have all his marls, soils, minerals, and other products analyzed by the chemist at the laboratory of the department station free of charge, and the board of agriculture is hereby authorized to pay the necessary expenses of the geological museum and they may authorize and supervise the publication of * * the 'Geology of North Carolina.'"

Section 2199 provides that, "The department shall prepare hand books, with maps, which shall contain all necessary infor-

mation in regard to mines, minerals, forests, soils, climates, waters and water-powers, fisheries, mountains, swamps, industries, and all such statistics as are best adapted to give proper information of the attractions which the state gives to immigrants, and shall make illustrative exposition thereof whenever practicable at inter-national exhibitions, and shall have authority to offer premiums for the encouragement of agriculture and mechanical produce and the raising of improved live stock in this state."

Section 2200. "The said department shall be authorized, in the interest of immigration, to employ an agent or agents at points in this country as it may deem expedient and desirable," and section 2201, "to establish and keep in its office a general land and mining registry." Section 2206: "To set apart and appropriate annually of the money secured from the tax on fertilizers, the sum of five hundred dollars for the benefit of the North Carolina Industrial Association, to be expended under the direction of the board of agriculture."

Chapter 308 of the Acts of 1885 is entitled "An act to establish and maintain an industrial school." Section 4 of said act provides: "The board of agriculture shall apply to the establishment and maintenance of said school such part of their funds as is not required to conduct the regular work of the department: *Provided*, that not more than five thousand dollars of these funds shall be offered to the establishment of the school in one year."

By chapter 410, Acts of 1887, the name of the industrial school is changed to "The North Carolina College of Agriculture and Mechanic Arts." And in section 6 it is provided that "the board of agriculture shall turn over to the establishment and maintenance of said college" the whole residue of their funds from licenses on fertilizers remaining over and not required to conduct the regular work of the department. This provision is repealed by section 2 of chapter 348 of the Acts of 1891. This revives the 4th section of chapter 308 of the Acts of 1885.

Chapter 426, Acts 1891, making an appropriation of $500 to the Industrial Association does not repeal chapter 2206 of The Code, but is an additional appropriation, and the appropriation of $10,000 for 1891 and 1892 to the Agricultural and Mechanical College does not repeal former appropriations.

Section 5, chapter 348, Acts of 1891.

Acts of 1887, chapter 409, sec. 15, provides: "All expenses incurred after the present fiscal year for the publication of geological reports may be paid out of the agricultural fund."

Under section 2208 of The Code, the fertilizer tax is appropriated for the purposes named in the foregoing acts, none of which bear any relation to the expenses connected with the inspection of fertilizers.

VI.

THE FIFTH, SIXTH, SEVENTH, EIGHTH AND NINTH ASSIGNMENT OF ERRORS, WHICH WILL BE CONSIDERED TOGETHER:

V. "It is held that the said tax is absolutely necessary to execute the inspection of fertilizers, whereas it should have held that the tax is much in excess of what is necessary therefor."

VI. "That the court refused to consider the evidence introduced to show that the amount of money raised by said tax was much in excess of what was absolutely necessary for that purpose."

VII. "That the evidence showed that the tonnage tax collected from January 21, 1891, to January 1st, 1892, was $33,264.08, and the absolutely necessary expenses of executing the inspection did not exceed $10,000, and the court held that this excess was not material to show that the charge was not an inspection law under the constitution."

VIII. "That the evidence showed that the tonnage tax collected form January 1st, 1892, to January 1st, 1893, amounted to $27,690.16, and the necessary cost of inspection did not exceed more than $10,000, and the court held that this excess was not material to show that it was not an inspection law."

IX. "That the evidence showed that the tonnage tax collected for the months of January, February, March, April and May, 1893, was $22,567.25, and the cost of inspection did not exceed $5,000, and the court held that this excess was not material to show that it was an inspection law."

The administration of the fund can be considered in order to ascertain the purpose and effect of the act.

Yale Lock Co *v.* Sargent, 117 U. S., 536.

The circuit court (record, pages 22 to 26) discusses the question involved in said assignments. On page 23, Judge Seymour says: "I think that in cases of this character, the court is not required to go into an examination of the question of whether the imposition is excessive unless for the purpose of deciding whether the tax is only colorably an inspection charge or a charge of a kindred character." This is an admission that the courts can consider the question whether the act is really and in effect an inspection law.

He refers to *Ouachita Packet Co.* v. *Aiken*, 121 U. S., 444, to illustrate his position. This case as well as *Huse* v. *Glover*, 119 U. S., 543, relate to works of a local character, and have no reference to such commerce as is within the exclusive jurisdiction of Congress. Besides there is no provision of the constitution limiting wharfage, port dues, etc., to such as may be absolutely necessary.

In regard to inspection laws, such duties as are imposed by

the states must be absolutely necessary for executing the inspection. This leaves no margain for an excessive levy.

In *McCullock* v. *Maryland*, 4 Wheaton, 316, Chief Justice Marshall, discussing the power of congress to incorporate a bank, says, at page 411: "But the constitution of the United States has not left the right of congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper for carrying into execution the foregoing power, all other powers vested by this constitution, in the government of the United States, or in any department thereof.'"

He further says, at page 413: "But the argument on which most reliance is placed, is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "*necessary and proper*" for carrying them into execution. The word necessary is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means and leaves to congress in each case, that only which is most direct and simple."

"Is it true that this is the sense in which the word "necessary" is always used. Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other. We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in this rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary.

To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction, that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely."

The expressions "necessary" and "absolutely necessary" are thus contrasted by the great Chief Justice, and if any duty at all, except as a matter of police, can be laid on a commodity imported into the state, before it comes within its political jurisdiction, it must be limited in amount to what is absolutely necessary. There is no choice.

It is contended that the provision that the "net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of congress," gives to congress the exclusive right to question the constitutionality of the levy. If this be so, the prohibition against the states to levy duties on imports and exports does not have the effect to make them null and void.

There is no political question involved in this case; a judicial one is raised.

Georgia *v.* Stanton, 6 Wall., 50.

It is true congress can control these matters, but congress has not done so. And if the individual who has sustained an injury by these laws cannot resort to the courts, he will be deprived of the means of having his grievances redressed. There is no wrong without an adequate remedy in the courts; a failure of congress to act cannot be held to make an act legal which would otherwise be unconstitional. Nor can it deprive the injured party of his remedy. Non-action by congress is no sanction to the state to regulate commerce.

"The question whether the particular duties exceed what is absolutely necessary for the execution of an inspection law, may be made a judicial question; and in addition to this the law imposing the inspection duty is at all times subject to the revision and control of congress."

2 Curtis on the Cons., 369.

The power of a state to lay this tax cannot be claimed as a reservation, because at the time when the constitution was

adopted there were inspection laws in force in the several states, but none can be found which imposes any duty on imports. This privilege to the extent to which it is conferred was given by the constitution of the United States.

VII.

THE TENTH, ELEVENTH, TWELFTH, THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR are set forth on pages 122 and 123 of the printed record.

All the questions raised by these exceptions have been considered in the discussion of the preceding assignments of error.

THOS. N. HILL,
JOHN W. HINSDALE,
Solicitors of Complainant and Appellant.

March 7th, 1896.